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I. INTRODUCTION

The last decade witnessed a substantial outpouring of scholarship on bankruptcy law. Scholars have toiled to develop theories concerning the function and operation of bankruptcy and corporate reorganization in our society.[2] The bankruptcy literature has tended to focus on the theoretical justifications for corporate reorganizations.[3] Although bankruptcy law is pre-

[2] *E.g.*, THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986); Donald R. Korobkin, *Rehabilitating Value: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991); Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919 (1991); James W. Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097 (1990); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155 (1989); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain*, 91 YALE L. J. 857 (1982).

[3] *See generally* Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729; Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L. J. 1043 (1992); Charles W. Adams, *An Economic Justification for Corporate Reorganizations*, 20 HOFSTRA L. REV. 117 (1991); Lucian A. Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988); Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127 (1986).

dominately statutory, until recently there has been relatively little discussion regarding the interpretation of bankruptcy statutes.[4]

In the last ten years there has also been a revival of statutory interpretation scholarship,[5] and different scholars have proposed different theories for how courts should interpret statutes.[6] The statutory interpretation literature has generated an important debate regarding the legislative process and the manner in which courts should interpret statutes. The statutory interpretation scholarship offers major insights into how the Supreme Court addresses, or should address, statutory interpretation issues.

The Supreme Court has addressed numerous provisions of the Bankruptcy Code.[7] Although many of the issues before the Supreme Court involving the

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[4] *See, e.g.*, Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L. J. 335 (1994); Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289 (1994); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L. Q. 535 (1993); Peter H. Carroll, III, *Literalism: The United States Supreme Court's Methodology for Statutory Construction in Bankruptcy Cases*, 25 ST. MARY'S L.J. 143 (1993); Walter A. Effross, *Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 SETON HALL L. REV. 1636 (1993); Charles J. Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823 (1991); Adam J. Winsch, Note, *The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law*, 79 GEO. L. J. 1831 (1991); Charles J. Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477 (1988).

[5] *See, e.g.*, Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

[6] *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)(courts should overrule antiquated statutes); T. Alexander Aleinikoff, *Patterson v. McLean: Updating Statutory Interpretation* 87 MICH. L. REV. 20 (1988)(nautical statutory interpretation); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59 (1988)(textualism); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543 (1988)(collaborative model); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 135 U. PA. L. REV. 1479 (1987)(dynamic statutory interpretation); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975)(public choice theory).

[7] 11 U.S.C. § 101-1501 (1988 & Supp. 1993) [hereinafter the Code]. The following are a list of the more important Supreme Court decisions involving bankruptcy: Rake v. Wade, 113 S. Ct. 2187 (1993)(an oversecured mortgagee is entitled to postpetition interest when a debtor cures a defaulted mortgaged pursuant to a Chapter 13 plan); Nobelman v. American Sav. Bank, 113 S. Ct. 2106 (1993)(a debtor may not bifurcate the claim of an undersecured residential mortgagee in a Chapter 13 plan); Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 113 S. Ct. 1489 (1993)(an inadvertent late filing of a proof of claim constitutes excusable neglect under Federal Rule of Bankruptcy Procedure 9006(b)(1)); Patterson v. Shumate, 112 S. Ct. 2242 (1992)(an ERISA pension plan could be excluded from a bankruptcy estate pursuant to § 541(c)(2) Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992) (exemption by declaration)); Barnhill v. Johnson, 112 S. Ct. 1386 (1992)(a transfer made by check is completed under § 547(b) when the bank has accepted the check); Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146 (1992)(under Judicial

Code have focused on creditor-debtor issues, the Supreme Court has not followed any recognizable "ideology" in deciding bankruptcy issues.[8] Rather, the determinative issue in Supreme Court bankruptcy decisions is the method of statutory interpretation that is utilized.

The predominant method of statutory interpretation used by the Supreme Court has been strict statutory construction. Under strict statutory construction the Court will employ the plain meaning rule which emphasizes that the answer to a bankruptcy issue should be resolved by analyzing the text of the

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Code Section 1292(b) an interlocutory order of the bankruptcy court can be appealed to a Circuit Court of Appeals); Dewsnup v. Timm, 502 U.S. 410 (1992)(a debtor may not use § 506(d) to strip down an undersecured mortgagee's claim in a Chapter 7 case); Union Bank v. Wolas, 502 U.S. 151 (1991)(payments on long term debt can satisfy the ordinary course of business exception contained in § 547(c)(2)); Toibb v. Radloff, 501 U.S. 157 (1991)(under § 109 an individual without an ongoing business may be a Chapter 11 debtor); Johnson v. Home State Bank, 501 U.S. 78 (1991)(an individual may immediately file for Chapter 13 after receiving a Chapter 7 discharge); Owen v. Owen, 500 U.S. 305 (1991)(a judicial lien can be eliminated under § 522(f), even though state law permitted the lien to impair the exemption); Farrey v. Sanderfoot, 500 U.S. 291 (1991)(a debtor may not use § 522(f) to avoid a judicial lien that was placed on his residence as part of a divorce decree); Grogan v. Garner, 498 U.S. 279 (1991)(the correct standard of proof concerning the discharge of a debt pursuant to Bankruptcy 11 U.S.C. § 523(a) is the preponderance of the evidence); Begier v. IRS, 496 U.S. 53 (1990)(prepetition trust fund payments are not preferences); Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990)(a Chapter 13 debtor was entitled to a discharge of a criminal restitution obligation); United States v. Ron Pair Enters., 489 U.S. 235 (1989)(a nonconsensual oversecured creditor is entitled to postpetition interest under § 506(b)); Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988)(the absolute priority rule under § 1129(b) prohibits a debtor from retaining a equity interest under a reorganization plan when the debtor is solely going to contribute his expertise and labor); United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365 (1988)(an undersecured creditor is not entitled to postpetition interest); Kelly v. Robinson, 479 U.S. 36 (1986)(a Chapter 7 debtor may not discharge a criminal restitution obligation); Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986)(a trustee may not use 11 U.S.C. § 554 to abandon an environmental waste site in contravention of state and local health and safety laws); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985)(a bankruptcy trustee controls the attorney-client privilege in a Chapter 7 case); NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) (collective bargaining agreement could be rejected pursuant to § 365(a), the burden of proof for rejecting a collective bargaining agreement was the balance of the equities; and a debtor did not commit an unfair labor practice when it unilaterally modified a collective bargaining agreement); United States v. Whiting Pools, Inc., 462 U.S. 198 (1983)(a Chapter 11 debtor could use § 542(a) to obtain property that been seized by the IRS); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)(the structure of the bankruptcy court system was unconstitutional).

[8] One commentator has stated:

> Not only does the Court fail to rely on bankruptcy policy expressly in any of its opinions, but it also is readily apparent that the Court's textualist approach is not a mask for a 'hidden agenda' in the bankruptcy area. The Court reaches results that are universally consistent with any theory of bankruptcy law. Some results comport with the economic account of bankruptcy law, while others coincide with the traditional explanation.

Rasmussen, *supra* note 4, at 565.

particular provision that governs the subject matter. If a particular provision is unclear or there is no specific provision that governs a particular problem, then the Supreme Court will engage in holistic statutory interpretation. Under holistic statutory interpretation the Court will attempt to derive an answer to a bankruptcy question by analyzing the entire Code and render an interpretation, which is harmonious with the entire statutory scheme.

This article analyzes the Rehnquist Court's use of strict statutory construction. It will argue that strict statutory construction can be justified under public choice and agency theories of statutory interpretation, and that strict construction promotes the implementation of bankruptcy policy. Strict statutory construction, moreover, is beneficial because it produces reliability and predictability, which is essential to our dynamic economy. The use of strict statutory construction precludes a court from relying on legislative history to manufacture the result that the court thinks is the best solution to the problem. Another justification for strict statutory construction is that it prevents bankruptcy judges from using their equitable powers to create entitlements that are not authorized by the Code. There are, however, detriments to using strict statutory construction. It can inhibit the development of bankruptcy law, and it is also unproductive when public policy issues are involved. Indeed, it can seriously inhibit the development of bankruptcy policy. After examining the benefits and detriments of strict statutory construction, this article concludes that bankruptcy courts should use it only when deciding debtor-creditor issues.

The argument of this article proceeds in four stages. Part II examines strict statutory interpretation, the Rehnquist Court's mode of statutory interpretation, and the evolution of the plain meaning rule and holistic statutory interpretation. Part III examines the rationales supporting strict statutory interpretation, public choice theory, separation of powers theory, and the principle of legislative supremacy. This section also argues that strict statutory construction can serve the goals of predictability and reliability in the interpretation of bankruptcy statutes. Part IV examines the adverse effects of strict statutory construction, in particular, whether it hinders the development of the law by unduly constraining a court's discretion. Finally, Part V proposes how courts should use strict statutory construction.

II. THE REHNQUIST COURT AND STRICT STATUTORY CONSTRUCTION

A. Strict Statutory Construction Has Become the Significant Mode of Statutory Construction in the Rehnquist Court

Although equitable principles play a major role in bankruptcy jurisprudence, the Rehnquist Court has embraced the concept of strict statutory construction.[9] The Rehnquist Court has employed two methods of strict

[9] *E.g.*, Patterson v. Shumate, 112 S. Ct. 2242 (1992) (plain meaning rule); Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146 (1992) (plain meaning rule); Union Bank v. Wolas, 502 U.S. 151 (1991) (strict statutory interpretation); Toibb v. Radloff, 501 U.S. 157 (1991)

statutory construction in its bankruptcy decisions. First, under the plain meaning method, the Court will usually rely upon the text of the statute to render its determination.[10] Second, under its holistic approach, the Court will analyze the structure of the Code and then reach a determination that it thinks is consistent with the text of a particular section and entire structure of the Code.[11] Both methods of statutory construction rely upon the express language of the Code to analyze bankruptcy questions. The legislative history of a statute is not considered,[12] and equity is not allowed to override an express provision of the Code.[13]

B. The Rehnquist Court, Plain Meaning and the Code

The Court has resorted to plain meaning interpretation to resolve various issues involving the Code.[14] In *United States v. Ron Pair Enterprises, Inc.*,[15] the debtor filed for Chapter 11, and the petitioner filed a proof of claim for unpaid withholding and social security taxes, penalties, and postpetition interest. Its claim was secured through a perfected tax lien, the petitioner contended that it was entitled to postpetition interest under 11 U.S.C. § 506(b)[16] because it was oversecured. The respondent contended that the petitioner was not entitled to postpetition interest because under the Bankruptcy Act only consensual oversecured creditors were entitled to receive postpetition interest. Further, the respondent argued that the text of section 506(b), reflected that the statute was solely intended to apply consensual secured creditors because section 506(b)

(plain meaning interpretation); Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990) (plain meaning interpretation); United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988) (holistic statutory interpretation).

[10] *See Patterson*, 112 S. Ct. at 2246; Toibb v. Radloff, 501 U.S. 157, 160-61 (1991); United States v. Ron Pair Enters., Inc. 489 U.S. 235, 241 (1989).

[11] *See* Johnson v. Home State Bank, 501 U.S. 78, 83, 85 (1991); United Sav. Ass'n of Texas v. Timbers on Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

[12] *See Ron Pair*, 489 U.S. at 240-42.

[13] Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206-07 (1988); *In re* Rashid, 97 B.R. 610, 615 (Bankr. W.D. Okla. 1989); *In re* Wiggs, 87 B.R. 57, 59 (Bankr. S.D. Ill. 1988).

[14] *E.g.*, *Patterson*, 112 S. Ct. at 2246 (1992); Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149-50 (1992); Union Bank v. Wolas, 112 S. Ct. 527, 530 (1991); *Toibb*, 501 U.S. at 160-61 (1991); *Ron Pair*, 489 U.S. at 240-42.

[15] 489 U.S. 235 (1989).

[16] Section 506(b) states:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under agreement under which such claim arose.

11 U.S.C. § 506(b) (1988).

permitted a creditor to recover reasonable fees and costs as provided under the agreement between the creditor and debtor. The issue was whether under section 506(b) a nonconsensual[17] oversecured creditor was entitled to postpetition interest, and the Court held that it was entitled to postpetition interest.[18]

Justice Harry Blackmun ruled that the answer to the question should be resolved by examining the language and enforcing the terms of the statute.[19] The express language of section 506(b) permitted a nonconsensual oversecured creditor to receive postpetition interest.[20] The granting of postpetition interest to a nonconsensual oversecured creditor was also mandated by the grammatical structure of section 506(b).[21] The language and punctuation of section 506(b) reflect that Congress did not intend to differentiate between consensual and nonconsensual secured creditors in the granting of postpetition interest to an oversecured creditor.[22] Further, allowing a nonconsensual over-

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[17] A nonconsensual secured creditor is an entity that has obtained a lien on either personal or real property through judicial process, such as a judgment creditor, or an entity that has obtained a lien pursuant to a statute, such as a mechanic's lien. A consensual secured creditor is someone that has obtained a lien on a debtor's property pursuant to an agreement. For example, an entity that has acquired an Article Nine security interest in personal property is a consensual secured creditor. Another example of a consensual secured creditor is an entity that obtained a mortgage on real property.

[18] *Ron Pair*, 489 U.S. at 249.

[19] The Court stated:

> The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' The language before us expresses Congress' intent-that postpetition interest be available-with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.

Id. at 241 (citations omitted).

[20] The Court stated:

> The relevant phrase in § 506(b) is: '[t]here shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.' 'Such claim' refers to an oversecured claim. The natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement. Recovery of postpetition interest is unqualified.

Id.

[21] *Id.* at 241-43.

[22] *Id.*

secured creditor postpetition interest did not contravene any important state or federal interest.[23]

Similarly, in *Nobelman v. American Savings Bank*,[24] where the debtors filed for Chapter 13, the respondent had a deed of trust on the debtors' principal residence and the respondent filed a proof of claim for principal, interest, and fees owed on a note amounting to a total of $71,335. The debtors' Chapter 13 plan valued their residence at $23,500, and the debtors proposed to make payments up to the value of the residence, $23,500. The debtors, relying on 11 U.S.C. § 506(a),[25] proposed to bifurcate the respondent's claim into secured and unsecured portions and to treat the remainder of the claim as unsecured. Under the plan, unsecured creditors would receive nothing. The respondent objected to its treatment under the Chapter 13 plan on the ground that, under 11 U.S.C. § 1322(b)(2),[26] the debtors could not bifurcate the claim of an undersecured residential mortgagee. The respondents prevailed in the bankruptcy court and district court and the Fifth Circuit affirmed. The Supreme Court granted certiorari to resolve a conflict among the circuits as to whether section 1322(b)(2) prohibited a Chapter 13 debtor from bifurcating the claim of a residential mortgagee in a Chapter 13 plan.

The Court, in an opinion by Justice Clarence Thomas,[27] held under section 1322(b)(2), that an undersecured mortgagee's claim could not be bifurcated into

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[23] *Ron Pair*, 489 U.S. at 243. The Court will deviate from the text of a bankruptcy statute if there is a significant federal or state interest, such as environmental protection, involved in the case. *See* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986).

[24] 113 S. Ct. 2106 (1993).

[25] The pertinent part of § 506(a) states:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.

11 U.S.C. § 506(a) (1988).

[26] Section 1322(b)(2) states:

> (b) Subject to subsections (a) and (c) of this section, the plan may- . . .
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; . . .

11 U.S.C. § 1322(b)(2) (1988).

[27] Since his arrival on the Court, Justice Thomas has been influential in the bankruptcy area. Justice Thomas has written three opinions, and in each decision he has employed strict statutory construction. *See* Rake v. Wade, 113 S. Ct. 2187 (1993); Nobelman v. American Sav. Bank, 113 S. Ct. 2106 (1993); Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146 (1992).

secured and unsecured segments.[28] Under section 1322(b)(2), a Chapter 13 debtor is prohibited from modifying the rights of a creditor who has a mortgage on the debtor's principal residence.[29] The term "rights" is not defined by the Code, but rather, is defined by state law.[30] The respondent's rights are contained in the mortgage instrument, and they include the rights to monthly principal payments, the right to an adjustable rate of interest, the right to retain the lien until the loan is paid, the right of acceleration, and the right to foreclose.[31] All of the preceding rights are protected from modification under section 1322(b)(2).[32] Congress elected to treat residential mortgagees differently than other secured creditors in Chapter 13 cases, and that is why it made an exception for residential mortgagees in section 1322(b)(2).[33] The Court refused to permit bifurcating because it would modify a residential mortgagee's claim.[34] The petitioners desired result was contrary to section 1322(b)(2), which prohibits the modification of a claim of a secured creditor who has a lien on the debtor's primary residence.[35]

The preceding discussion reflects the Rehnquist Court's tendency to base its decision upon the text of the Code. The Court will meticulously dissect the words used in the text of a statute to determine the import of a statute. The Court will employ the ordinary meaning of a word, and will not attribute any special meaning to a word. In addition, as exemplified by *United States v. Ron Pair Enterprises*,[36] the Court will analyze the grammatical structure of a statute to determine the meaning of the provision. The Rehnquist Court will attempt to interpret a statute in a manner that is consistent with the ordinary meaning of the words used in the statute, and a manner that is consistent with the grammatical structure of the text.

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[28] *Nobelman*, 113 S. Ct. at 2106.

[29] *Id.* at 2109.

[30] *Id.* at 2110.

[31] *Id.*

[32] *Id.*

[33] *Nobelman*, 113 S. Ct. at 2111.

[34] The Court stated:

> Petitioners propose to reduce the outstanding mortgage principal to the fair market value of the collateral, and, at the same time, they insist that they can do so without modifying the bank's rights 'as to interest rates, payment amounts, and [other] contract terms.' That appears to be impossible. The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components. Petitioners cannot modify the payment and interest terms for the unsecured component, as they propose to do, without also modifying the terms of the secured component.

Id. (citation omitted).

[35] *Id.*

[36] 489 U.S. 235 (1989).

Under the Rehnquist Court, the legislative history of a statute is irrelevant, and therefore, legislative history has played a minimal role in the Rehnquist Court's bankruptcy decisions. Under the plain meaning rule, the Rehnquist Court has been averse to examining the legislative history of the statute because it is thought that Congress has made its intent clear through the use of the words in the particular statute. Thus, there is no need to refer to legislative history in order to determine congressional intent.

The Rehnquist Court is reluctant to employ policy arguments that would contradict the express language of a statute. The plain meaning method does not permit a court to entertain equitable arguments that would have the effect of nullifying the clear language of the statute. The Rehnquist Court will deviate from the text of a statute only when there is a compelling federal or other societal interest which justifies deviating from the plain language of a statute.[37]

C. Holistic Statutory Construction

Another method of strict construction that the Rehnquist Court has used is holistic statutory construction. When the Court has been unable to resolve a bankruptcy issue by analyzing a particular statute, it has examined the structure of the Code to resolve the specific issue.[38] The Court reviews sections of the Code that are relevant to the disposition of the issue to develop a holding that is harmonious with the express provisions of the Code.

The Court used this approach in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*[39] There an undersecured creditor moved for relief from the automatic stay[40] pursuant to section 362(d)(1).[41] The

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[37]United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242-44 (1989). For example, in Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 507 (1986), the Supreme Court deviated from the express language of 11 U.S.C. § 554, and it prohibited a trustee from abandoning a toxic waste site. Section 554 did not contain any express limitations on the trustee's abandonment power. *Midlantic*, 474 U.S. at 504. The Court, nevertheless, ruled that environmental compelling state and local interests restricted a trustee's power to abandon a toxic waste site. *Id.* at 507.

[38]*See, e.g.*, Johnson v. Home State Bank, 501 U.S. 78 (1991); United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988).

[39]484 U.S. 365 (1988).

[40]Section 362(a) provides that when a bankruptcy petition is filed that the automatic stay goes into effect. 11 U.S.C. § 362(a)(1) (1988). Section 362(a) states:

> Except as provided in subsection (b) of this section, a petition filed under § 301, 302, or 303 of this title, or an application filed under § 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. § 78eee(a)(3)), operates as a stay, applicable to all entities, of -
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

undersecured creditor contended that under section 362(d)(1), the phrase "interest in property" includes the secured party's right to foreclose on its collateral and apply it in payment of its debt.[42] If a secured party is precluded from foreclosing, then it is not adequately protected unless the secured party is reimbursed for the use of the proceeds while the automatic stay is in effect.[43] The bankruptcy court conditioned the continuance of the automatic stay on monthly payments by the respondent at the market rate of 12% per annum, on the estimated amount realizable on foreclosure, commencing six months after the commencement of the bankruptcy case, to reflect the normal delay in foreclosure.[44] Although the district court affirmed, en banc the Fifth Circuit Court of Appeals reversed.[45] The Supreme Court granted certiorari to determine whether an undersecured creditor was entitled to compensation under section 362(d)(1) for the delay caused by the automatic stay in foreclosing on its collateral.[46]

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(2) the enforcement against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. § 362(a)(1) (1988).

[41] Section 362(d)(1) states:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; . . .

11 U.S.C. § 362(d)(1) (1988).

[42] *Timbers of Inwood*, 484 U.S. at 370-71.

[43] *Id.*

[44] *Id.* at 369.

[45] *Id.*

[46] *Id.*

For a unanimous Court, Justice Antonin Scalia held that an undersecured creditor was not entitled to postpetition interest.[47] The Court based its decision on its interpretation of different Code Sections because no particular Code provision addressed the issue. Although section 362(d)(1) could be read to authorize the payment of postpetition interest to undersecured creditors,[48] it was necessary to refer to other provisions of the Code to determine whether undersecured creditors were entitled to lost opportunity costs.[49] Allowing an undersecured creditor to receive compensation for lost opportunity costs would have been contradictory to 11 U.S.C. § 506(b), which permits only oversecured creditors postpetition interest.[50] The Court also rejected the petitioner's argument that section 506(b) was an alternative method for granting postpetition interest.[51] The granting of postpetition petition interest would have been contrary to the policy underlying section 506(b).[52] Granting

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[47] 484 U.S. at 382.

[48] The phrase "interest in property" was undefined and nebulous. *Id.* at 371. Therefore, a plausible interpretation of "interest in property" could require the payment of postpetition interest to an undersecured creditor. *Id.* at 370-71.

[49] Justice Scalia wrote:

> Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. That is the case here. Section 362(d)(1) is only one of a series of provisions in the Bankruptcy Code dealing with the rights of secured creditors. The language in those other provisions, and the substantive dispositions that they effect, persuade us that the 'interest in property' protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure.

Id. at 371 (citations omitted).

[50] The Court declared:

> Since this provision [506(b)] permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest. If the Code had meant to give the undersecured creditor, who is thus denied interest on his *claim*, interest on the value of his *collateral*, surely this is where that disposition would have been set forth, and not obscured within the 'adequate protection' provision of § 362(d)(1). Instead of the intricate phraseology set forth above, § 506(b) would simply have said that the secured creditor is entitled to interest 'on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser.' Petitioner's interpretation of § 362(d)(1) must be regarded as contradicting the carefully drawn disposition of § 506(b).

Id. at 372-73 (citation omitted).

[51] *Id.* at 373.

[52] The Court stated:

> This theory of duplicate protection for oversecured creditors is implausible even in the abstract, but even more so in light of the historical principles of bankruptcy law. Section 506(b)'s denial of postpetition interest to under-

an undersecured creditor lost opportunity costs would have been contrary to 11 U.S.C. § 552 because such a grant would have effectively given an undersecured creditor a security interest in property acquired after the commencement of the case.[53] Finally, the petitioner's interpretation of 11 U.S.C. § 362(d)(1) would have made nonsense of section 362(d)(2).[54] The petitioner alleged that its inability to take immediate possession of its collateral was cause for granting the undersecured creditor lost opportunity costs.[55] But, the petitioner's argument would have made section 362(d)(2) a nullity.[56]

Timbers is significant because it introduced a new method of statutory construction. As with the plain meaning rule, the focus under holistic statutory construction is on the words enacted by Congress as reflected by the entire statutory scheme. As *Timbers* demonstrates, when a particular provision fails to address an issue the Court will examine the entire statutory scheme in order

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> secured creditors merely codified pre-Code bankruptcy law, in which that denial was part of the conscious allocation of reorganization benefits and loses between undersecured and unsecured creditors. 'To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors.'

Timbers of Inwood, 484 U.S. at 365.

[53] Justice Scalia wrote:

> Section 552(b) therefore makes possession of a perfected security interest in postpetition rents or profits from collateral a condition of having them applied to satisfying the claim of the secured creditor ahead of the claims of unsecured creditors. Under petitioner's interpretation, however, the undersecured creditor who lacks such a perfected security interest in effect achieves the same result by demanding the 'use value' of his collateral under § 362. It is true that § 506(b) gives the oversecured creditor, despite lack of compliance with the conditions of § 552, a similar priority over unsecured creditors; but that does not compromise the principle of § 552, since the interest payments come only out of the 'cushion' in which the oversecured creditor *does have* a perfected security interest.

Id. at 374.

[54] *Id.* at 374-75.

[55] *Id.*

[56] The Court wrote:

> By applying the 'adequate protection of an interest in property' provision of § 362(d)(1) to the alleged 'interest' in the earning power of the collateral, petitioner creates the strange consequence that § 362 entitles the secured creditor to relief from the stay (1) if he is undersecured (and thus not eligible for interest under § 506(b)), *or* (2) if he is undersecured *and* his collateral 'is not necessary to an effective reorganization.' This renders § 362(d)(2) a practical nullity and a theoretical absurdity. If § 362(d)(1) is interpreted in this fashion, an undersecured creditor would seek relief under § 362(d)(2) only if his collateral was not depreciating (or it was being compensated for depreciation) and he was receiving market rate interest on his collateral, but nonetheless wanted to foreclose.

Id. at 375.

to resolve the issue pending before it. Again, the Court will focus on the legislation that Congress has enacted to reach its determination. The Court will attempt to reach a decision that harmonizes the Code section at issue with the entire statutory scheme. The Rehnquist Court avoids resorting to the legislative history of the particular enactment in order to reach its decision. Indeed, as with the plain meaning method, the holistic approach minimizes concepts such as equity and public policy which play only minor, if any, roles in interpreting the Code.

III. THE JUSTIFICATIONS OF STRICT STATUTORY CONSTRUCTION

A. Public Choice Theory

Strict statutory construction of the Code can be explained under the public choice theory of statutory interpretation. Public choice theory posits that legislation is not enacted to further the public good, but rather, to further the ends of a particular interest group.[57] Under public choice theory, legislators are primarily concerned with getting reelected.[58] Interest groups that make significant campaign contributions wield a disproportionate amount of power in the legislature, and it is these groups that are able to have legislation passed that furthers their economic interests.[59]

Public choice theory promotes strict statutory construction as a means of enforcing legislative contracts between the legislature and the interest group who sought the enactment of specific legislation.[60] The terms of the legislative

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[57]Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31, 35 (1991); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446-47 (1989).

[58]Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 14 (1991); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 705 (1987).

[59]William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 287 (1988); Landes & Posner, *supra* note 6, at 877. Professor Macey has stated:

> The economic theory of legislation predicts that laws are likely to benefit the few at the expense of the many, because no one has an incentive to enact laws that benefit the people in general. This is the classic 'free-rider' problem that inevitably plagues public interest legislation in a representative democracy. Because the benefits of such legislation are spread among everyone in the population, individual members of the public lack sufficient incentives to promote public interest laws since all the costs of such promotion must be absorbed by the promoters themselves. Hence, the laws that are enacted will tend to benefit whichever small, cohesive special interest groups lobby most effectively.

Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 231-32 (1986).

[60]Eskridge & Frickey, *supra* note 5, at 325; William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L. J. 319, 320 (1989).

contract are the text of the statute.[61] Public choice theory posits that a judge should ignore the legislative history of the statute because it is impossible to reconstruct legislative intent. Instead, the courts should focus on the words employed in the statute because the words of the statute embody the deal struck between the interest groups and the legislature. A court should not deviate from the terms of a statute to determine a case in a manner which the judge thinks that the legislature would have acted because the court will only be engaging in mere speculation.[62]

The judiciary performs a vital role in public choice theory through the employment of strict statutory construction. It is the independent judiciary that will enforce the terms of the legislative bargain because it is the judiciary that will interpret the statute.[63] An independent judiciary with lifetime tenure will be free from political pressure from the current legislature, and thus, it will be able to enforce original legislative intent as set forth by the words of the statute.[64] Unless there is some constitutional infirmity, the courts should uphold the legislation and not substitute their views for those of Congress.[65]

Public choice theory is useful because one can view the Code as a series of legislative deals between different interest groups and the Congress. For example, the 1984 amendments to the Code reflect public choice theory in operation. The consumer credit industry was displeased with the manner in which debtors could readily liquidate their consumer debt in Chapter 7. Debtors would amass significant consumer debt and discharge the debt in Chapter 7, while simultaneously reaffirming their residential mortgage obligations and keeping their homes. Consequently, the consumer credit

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[61] Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1603 (1991); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

[62] Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 881 (1987).

[63] It is only an independent judiciary that will be free from political influence, and thus, at liberty to interpret a statute in accordance with original legislative understanding of the statute, which is usually the text of the statute. *See* Landes & Posner, *supra* note 6, at 879.

[64] *Id.*

[65] Professor Macey has written:

> On the other hand, when an interest group bargain is explicit, courts should uphold the bargain. It is well settled that it is illegitimate for judges to impose their own values in place of those of the legislature, because such substitution thwarts Congress' constitutional authority to make law. The legislature, and not the judiciary, is the forum through which societal preference are aggregated. Statutory decisions are legitimate only when judges enforce the law as enacted by the legislature. This general maxim that judges must respect the legislature's will is subject only to the judicial power to review statutes for constitutional infirmity.

Macey, *supra* note 59, at 239.

industry obtained the enactment of 11 U.S.C. § 707(b).[66] Section 707(b) makes it more difficult for affluent debtors to file for Chapter 7 and discharge their consumer debt because a bankruptcy court is authorized to dismiss a case if granting relief would constitute a substantial abuse.

Commercial real estate interests were troubled with the manner in which some real estate would remain vacant during the pendency of a bankruptcy case. The commercial real estate lobby was able to obtain the enactment of 11 U.S.C. § 362(b)(10).[67] Pursuant to section 362(b)(10), a lessor of nonresidential real property can take action to obtain possession of the property after the expiration of the stated term of the lease before or after the commencement of a bankruptcy case. The commercial real estate interests also secured the passage of 11 U.S.C. § 365(d)(3),[68] which mandates that a trustee perform all obligations of the lease until the lease is either accepted or rejected by the bankruptcy estate. The commercial real estate lobby also obtained the passage of 11 U.S.C. § 365(d)(4).[69] Under section 365(d)(4), within the sixty day period after the entry

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[66] Section 707(b) states:

> After notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b) (1988).

[67] Section 362(b)(10) states:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), does not operate as a stay- . . . (10) under subsection (a) of this section, of an act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; . . .

11 U.S.C. § 362(b)(10) (1988).

[68] The pertinent part of § 365(d)(3) states:

> The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3) (1988).

[69] Section 365(d)(4) states:

> Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4) (1988).

of the relief order a debtor or trustee must either make a motion or obtain an order permitting it to assume or extending its time to assume a nonresidential lease of real property or else the nonresidential lease will terminate by operation of law. Finally, the commercial real estate lobby obtained the enactment of 11 U.S.C. § 541(b)(2).[70] Under section 541(b)(2), a lease which expired according to the stated term of the lease before the commencement of the bankruptcy case does not become property of the estate, and a lease which expires according to the stated term of the lease during the course of a bankruptcy case ceases to become property of the estate. The real estate lobby secured various amendments to the Code to protect its interest against delinquent debtors. These amendments reflect how a particular industry can obtain legislation to protect its interests.

Another example of special interest legislation is 11 U.S.C. § 1114.[71] When LTV Corporation filed for Chapter 11 it immediately stopped paying the medical and welfare benefits of its retirees.[72] This caused an uproar by organized labor, and Congress enacted section 1114 to regulate the treatment of retirement benefits in a Chapter 11 case.[73] Section 1114 was intended to prevent Chapter 11 debtors from unilaterally terminating the retirement benefits of its former workers. Thus, section 1114 is another example of public choice legislation.

The preceding discussion reflects how different interest groups were instrumental in obtaining bankruptcy legislation that dealt with specific issues that affected different interest groups. Strict statutory construction of bankruptcy statutes insures not only that legislative contracts will be enforced, but also that congressional intent will be effectuated. Public choice theory provides an analytical framework for understanding that the Code is economic legislation which regulates debtor-creditor relationships. When Congress enacts bankruptcy legislation it is usually after receiving input from the interest groups that will be affected by the legislation. Normally, Congress will enact

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The purpose underlying Code § 365(d)(4) is to compel the debtor to take some action within the sixty day period. If the debtor fails to take any action, then the lease is deemed rejected by operation of law. BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL 7.10[6] (3d ed. 1992).

[70]Section 541(b)(2) states:

> (b) Property of the estate does not include- . . .
> (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

11 U.S.C. § 541(b)(2) (1988).

[71]11 U.S.C. § 1114 (1988).

[72]2 COLLIER BANKRUPTCY MANUAL ¶ 1114.01 (L. King ed. 1994).

[73]S. REP. NO. 119, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 683.

bankruptcy legislation after studying, debating and deliberating over a particular issue, and the legislation that is enacted is a result between Congress and the different interest groups. Strict statutory construction helps to enforce the deal that was struck between the interest groups and Congress because strict statutory construction requires a court to adhere to the text of the statute. If a court were at liberty to deviate from the text of a bankruptcy statute, then that would destroy the legislative deals and the compromises that underlie the Code. Thus, public choice provides a rationale for strict statutory interpretation because strict statutory construction is the mechanism for the enforcing legislative deals.

B. Legislative Supremacy

The Constitution delegates the authority to enact laws to Congress.[74] Congress is democratically elected, and therefore, is accountable to the electorate. Under the agency theory of statutory interpretation, it is incumbent upon the judiciary to interpret the text of the statute as enacted by Congress.[75] If the judiciary departs from the text of the statute, it is legislating, thereby violating the separation of powers doctrine. Judicial activism denigrates the reputation of the judiciary because Article III judges have lifetime tenure and are not accountable to the electorate. Further, if the electorate disagrees with the enactment of particular legislation, then the electorate has the option of voting the legislator out of office. However, the electorate does not have the option of voting an Article III judge out of office. Even though bankruptcy judges are Article I judges, they serve for a fourteen year term, and they are relatively insulated from political pressure and are not accountable to the voters.[76] Therefore, judicial activism by bankruptcy judges is also thought to be antidemocratic and contrary to the separation of powers doctrine.

The concept of legislative supremacy is important in the context of the Code. Congress spent several years studying the various problems of the Bankruptcy Act, and after several years of study it enacted a comprehensive Code. The Code is a comprehensive statute which regulates insolvencies and reorganizations; if courts freely deviate from the text of the Code, then the policies underlying particular statutes and the Code would be undermined. Therefore, in order for legislative supremacy to work the judiciary must strictly interpret statutes.

Legislative supremacy works when Congress has enacted a precise statute. A clearly worded statute transmits a clear message to the judiciary and society that a particular statute will govern a particular situation. When a statute is

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[74]U.S. CONST. art I, § 1.

[75]Under the agency theory of statutory interpretation, it is incumbent upon the judiciary to follow the text of a statute and not deviate from the text of the statute. When the judiciary faithfully adheres to the text of the statute it fulfills its role under the Constitution. Sunstein, *supra* note 57, at 415.

[76]28 U.S.C. § 152(a)(1) (1988).

clear, a court should act as an agent of Congress and enforce the statute according to the plain meaning of the statute.[77] It is through the enforcement of a clearly written statute that the judiciary upholds the concept of legislative supremacy.

For example, in *Patterson v. Shumate*,[78] the debtor was a participant in an ERISA pension plan, and, as required by law, the plan contained an anti-alienation provision. Pursuant to 11 U.S.C. § 541(c)(2),[79] the debtor attempted to exclude from his bankruptcy estate his interest in the plan. The trustee contended that the debtor's interest in the plan was part of his bankruptcy estate. The Court granted certiorari to determine whether under section 541(c)(2) an ERISA pension plan which contains an anti-alienation provision could be excluded from a bankruptcy estate. The Court held that under section 541(c)(2) ERISA pension plans could be excluded from a bankruptcy estate.[80] The Supreme Court examined the express language of section 541(c)(2), and it reached the conclusion that nonbankruptcy law includes ERISA.[81] The Court also reasoned that if Congress had intended to limit the term "applicable nonbankruptcy law" only to state law it would have used the phrase "state law"; however, Congress did not restrict section 541(c)(2) to only state law.[82] Plainly read, section 541(c)(2) encompassed ERISA plans.[83] The Court was satisfied that the particular plan contained an anti-alienation provision and met the test contained in section 541(c)(2).[84]

The preceding discussion supports this author's position that, when Congress has tailored a specific statute to govern a particular situation, a court should enforce the terms of the statute. The legislature and judiciary would

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[77] Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 281, 287 (1989).

[78] 112 S. Ct. 2242 (1992).

[79] Section 541(c)(2) states:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2) (1988).

[80] *Patterson*, 112 S. Ct. at 2250.

[81] The Court stated:

> The natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law. Nothing in § 541 suggests that the phrase 'applicable nonbankruptcy law' refers, as petitioner contends, exclusively to *state* law. The text contains no limitation on 'applicable nonbankruptcy law' relating to the source of the law.

Id. at 2246.

[82] *Id.*

[83] *Id.* at 2247.

[84] *Id.* at 2247-48.

then be performing their roles as set forth in the Constitution. The judiciary in making their decisions would not be imposing its political preferences or engaging in equity, but rather, enforcing the clear terms of the statute.[85]

C. The Enforcement of Bankruptcy Policy

When Congress has contemplated, debated, and enacted legislation concerning a particular issue, strict statutory construction of a particular statute can lead to the implementation of bankruptcy policy. When Congress enacted the Code it revised the eligibility requirements for debtors, and it liberalized the requirements for filing for Chapter 11.[86] Pursuant to 11 U.S.C. § 109(d), Congress provided that corporations, partnerships, and individuals could reorganize under section 109(d).[87] Congress intended to provide open access to Chapter 11 to avoid unnecessary liquidations, and therefore, one does not have to be insolvent to file for Chapter 11.

In *Toibb v. Radloff*,[88] for example, the Court used strict statutory construction to enforce the policies underlying section 109(d). There, the petitioner was a former staff attorney with the Federal Energy Regulatory Commission who was employed as a consultant with Independence Electric Corporation (hereinafter IEC). The petitioner also owned 24% of IEC's stock. After IEC terminated the petitioner's employment, he was unable to obtain work. Thereafter, the petitioner filed for Chapter 7. During the Chapter 7 case, IEC offered to purchase the petitioner's shares for $25,000. When the petitioner became aware of the offer, he moved to convert his case to Chapter 11. The bankruptcy court dismissed the petitioner's Chapter 11 case because the debtor was not engaged in an ongoing business. The district court and Court of Appeals for the Eighth Circuit affirmed the decision to dismiss the petitioner's case. The Supreme Court granted certiorari, and the issue before the Court was whether an individual who was not engaged in an ongoing business was eligible for Chapter 11.

The Supreme Court held that an individual who is not engaged in business is eligible for Chapter 11.[89] The Court relied upon the express language of

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[85]The agency theory of statutory interpretation is a vital element of public choice theory. Public choice theory only operates if the judiciary is willing to enforce the text of the statute. If the judiciary is willing to depart from the text of the statute, then the legislative contract will not be enforced and the interest group will not receive the benefit of its bargain.

[86]*See In re* Johns-Manville Corp., 36 B.R. 727, 732 (Bankr. S.D.N.Y. 1984).

[87]Section 109(d) states:

> Only a person that may be a debtor under Chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under Chapter 11 of this title.

11 U.S.C. § 109(d) (1988).

[88]111 S. Ct. 2197 (1991).

[89]*Id.* at 2202.

section 109 to reach its holding.[90] Section 109(d) does not preclude an individual from filing for Chapter 11.[91] Significantly, the Code did not contain an ongoing business requirement for Chapter 11.[92] If Congress had intended to restrict the use of Chapter 11 by individuals, it would have expressly placed a restriction in section 109.[93] Further, the legislative history was insufficient to contradict the express language of section 109(d).[94]

In *Toibb* the strict construction of section 109(d) implements the bankruptcy policy of open access to Chapter 11 relief. Congress made a conscious decision to permit open access to Chapter 11 relief because the text of section 109(d) expressed this intention because it contains no express prohibition which prevents an individual without an ongoing business from filing for Chapter 11. The Court implemented congressional policy by strictly construing section 109(d) and not imposing any implied requirements. Strict statutory construction is an important tool in implementing congressional policy because the text of a carefully drafted statute will reflect the policy that the statute is attempting to implement and the goals that the statute is attempting to effectuate. Therefore, when Congress has studied, debated and enacted specific bankruptcy legislation concerning a particular issue, strict statutory construction leads to the implementation of bankruptcy policy.

D. Reliance on Legislative History Can Be Dubious

A major feature of strict statutory construction is that it deemphasizes and distrusts legislative history. Legislative history is thought to be unreliable as a true gauge of what Congress intended because usually Congressmen and Senators do not review committee reports before they enact legislation. Furthermore, the legislators do not play a major role in drafting the committee reports, but it is the staffers who are normally responsible for writing the report. The only document that the legislators approve is the particular statute, and this is the only document that has the imprimatur of the entire legislative body.

Legislative history can be manipulated to produce a desired outcome; therefore, relying upon legislative history to interpret a statute can lead to the misinterpretation of a statute. Professors Daniel A. Farber and Philip P. Frickey have made the following remarks concerning the use of legislative history to interpret statutes:

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[90] *Id.* at 2199.

[91] *Id.*

[92] *Id.*

[93] *Toibb*, 111 S. Ct. at 2199.

[94] *Id.* at 2200. The House Report concerning the Code stated that if an individual was ineligible for Chapter 13, then the only available chapter for relief was Chapter 7. *Id.* The Senate Report stated that although primarily designed for business, individuals were also eligible for Chapter 11 relief. *Id.* Therefore, the Court was reluctant to rely on the legislative history to disregard the express provisions of the Code. *Id.*

> Imagine a country where laws are usually the unpredictable results of shifting coalitions and arbitrary agendas. Legislative committees produce official reports that purport to explain those laws, but are actually concocted by staff members and lobbyists to deceive courts about the meaning of the statutes. After statutes are passed, legislators contrive to smuggle their personal interpretations of the laws into later committee reports and debates dealing with other matters. Courts foolishly give credence to this deceptive evidence of a legislative intent that itself is little more than a legal fiction; moreover, the courts sometimes even elevate counterfeit legislative history above the duly enacted language of the law itself.[95]

A case that reflects how a court can manipulate legislative history to reach a desired outcome is *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*.[96] The debtor was one of the largest steel manufacturers in the United States.[97] The debtor and the United Steelworkers of America (hereinafter Union) were parties to a collective bargaining agreement (hereinafter CBA), and approximately 8,500 employees were subject to the CBA. Beginning in the early 1980's, the debtor requested and received various concessions from the Union.[98] In the middle of January 1985, the Union was asked to make more concessions; however, the Union refused to acquiesce to the debtor's requests.[99] The Union wanted the debtor's lenders to also make concessions. Thereafter, the debtor made another proposal which sought concessions from the Union, the lenders, and the debtor's shareholders.[100] The Union was dissatisfied with this proposal because it thought it was imprudent for the debtor to pledge all of its assets to secure all of its old debt.[101] On April 16, 1985, the debtor filed for Chapter 11, and on May 31, 1985, the debtor filed a motion to modify the CBA.[102] The application sought various modifications to the CBA including an hourly wage reduction from $21.40 to $15.20 for a five year period.[103] Further, there was no snap-back provision concerning the hourly wage if the debtor's performance turned out to be better than its financial

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[95] Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 423 (1988).

[96] 791 F.2d 1074 (3d Cir. 1986).

[97] *Id.* at 1076.

[98] *Id.* at 1076-77.

[99] *Id.* at 1077.

[100] *Id.*

[101] *Wheeling-Pittsburgh Steel*, 791 F.2d at 1077.

[102] *Id.* at 1077-78.

[103] *Id.* at 1078.

projections.[104] The bankruptcy court permitted the modification of the CBA because the modifications were necessary to the debtor's reorganization.[105] The district court affirmed the bankruptcy court.[106] The Union appealed the decision regarding the modification of the CBA to the Third Circuit Court of Appeals.[107]

The principal issue on appeal before the Third Circuit was what was the meaning of the term "necessary modification" as used in 11 U.S.C. § 1113(b)(1)(A).[108] The Third Circuit Court of Appeals held that a necessary modification is a modification that is essential to the debtor's short term survival.[109] The court began its analysis by stating that the enactment of section 1113 was an attempt to legislatively overrule the *Bildisco* decision.[110] The Third Circuit focused on the different bills that were introduced to govern the rejection of collective bargaining agreements.[111] The court also noted that the concept of "necessary modification" is derived from legislation proposed by Senator Robert Packwood, and that different legislators thought that section 1113 resembled the Packwood Amendment.[112] Senator Packwood thought that the term "necessary modification" only permitted modifications that were

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104 *Id.*

105 *Id.*

106 *Wheeling-Pittsburgh Steel*, 791 F.2d at 1076.

107 *Id.*

108 Section 1113(b)(1) states:

> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall-
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> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably. . . .

11 U.S.C. § 1113(b)(1)(A) (1988).

109 *Wheeling-Pittsburgh Steel*, 791 F.2d at 1088-89.

110 *Id.* at 1081-82. In *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), the Court held that a collective bargaining agreement was an executory contract that could be rejected under § 365(a). The Supreme Court, in addition, held that the balancing of the equities test was the correct test for determining whether a collective bargaining agreement should be rejected. *Id.* Finally, the Court ruled that a debtor did not commit an unfair labor practice when it unilaterally modified a collective bargaining agreement prior to rejecting the agreement. *Id.*

111 *Wheeling-Pittsburgh Steel*, 791 F.2d at 1083-84.

112 *Id.* at 1087-88.

necessary to a successful reorganization.[113] The court, based on the statements of the various legislators, concluded that the term "necessary modification" is intended to mean a modification that was essential to the company's financial reorganization.[114] The Third Circuit also concluded that the proposed modifications had to be essential to the debtor's short term survival.[115]

The Third Circuit also ruled that the necessity requirement has to be interpreted along with the requirement that all parties be treated "fairly and equitably."[116] The court held the debtor's proposal did not contain necessary modifications because it lacked a snap-back provision.[117] The Third Circuit also held that the bankruptcy court erred because it applied an incorrect standard in granting the motion to modify the CAB.[118] The bankruptcy court focused on the debtor's long-term rehabilitation, rather than on the debtor's immediate

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[113] *Id.* at 1088.

[114] The Third Circuit stated:

> The 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor can lower its costs. Such an indulgent standard would inadequately differentiate between labor contracts, which Congress sought to protect, and other commercial contracts, which the trustee can disavow at will. The congressional consensus that the 'necessary' language was substantially the same as the phrasing in Senator Packwood's amendment, which looked to the 'minimum modifications . . . that would permit the reorganization,' requires that 'necessity' be construed strictly to signify only modifications that the trustee is constrained to accept because they are directly related to the Company's financial condition and its reorganization. We reject the hypertechnical argument that 'necessary' and 'essential' have different meanings because they are in different subsections. The words are synonymous.

791 F.2d at 1088.

[115] The court stated:

> It is significant that the Thurmond amendment, which the conferees did not accept, and *Bildisco*, which they clearly sought to modify, seemed directed to the successful rehabilitation of the debtor, which suggests focus on the long-term economic health of the debtor. While we do not suggest that the general long-term viability of the Company is not a goal of the debtor's reorganization, it appears from the legislators' remarks that they placed the emphasis in determining whether and what modifications should be made to a negotiated collective bargaining agreement on the somewhat shorter term goal of preventing the debtor's liquidation, the mirror image of what is 'necessary to permit the reorganization of the debtor.'

Id. at 1088-89.

[116] *Id.* at 1089.

[117] *Id.* at 1090.

[118] *Id.*

survival.[119] The debtor's failure to include a snap-back provision unfairly discriminated against the Union.[120]

The weakness with the holding of the *Wheeling-Pittsburgh Steel* decision is that it propels inconclusive legislative history to supersede the express language of the statute, and it fails to read section 1113 in conjunction with other Code sections.[121] The court manipulates indecisive legislative history not only to rebut the clear text and structure of section 1113, but also to rebut related provisions of the Code. First, the word 'necessary' is not synonymous with the word 'essential'. The word 'essential' is used in section 1113(e) to permit interim changes to a collective bargaining agreement if an interim change is essential to the continuation of the debtor's business.[122] However, section 1113(b)(1)(A)[123] uses the word 'necessary' when the court is determining whether the debtor should be permitted to permanently modify a collective bargaining agreement.[124] If Congress had intended to permit only essential

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[119] *Wheeling-Pittsburgh Steel*, 791 F.2d at 1090.

[120] *Id.* at 1093.

[121] The problem in is set forth in the following statement:

> When courts and agencies use legislative history to find a more specific intent then the statute expresses, legislators have an incentive to 'manufacture' legislative history on points of interest to them. This manufacturing can occur at any time, even long before a bill is introduced, in the hearings or meetings between agency staff and members of Congress preceding the bill drafting. Most manufacturing, however, seems to occur after a bill has been introduced, by members of Congress who would rather manufacture legislative history that expresses their intent then try to amend the bill to express it. All it takes is one member of Congress declaring on the floor his or her 'understanding' of what some vague portion of the bill is 'intended to mean.' Normally, however, two members, one of whom is a sponsor of the bill, cooperate. The second member asks the sponsor what the bill is intended to mean, and the sponsor answers.

W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 397 (1992).

[122] Section 1113(e) states:

> If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

11 U.S.C. § 1113(e) (1988).

[123] 11 U.S.C. § 1113(b)(1)(A) (1988).

[124] *Id.*

modifications to permit reorganization, then presumably it would have used the word 'essential' instead of the word 'necessary'.

The Third Circuit's analysis is also flawed because it fails to take into consideration the structure of section 1113. Section 1113(e) is solely concerned with granting a debtor interim relief from a collective bargaining agreement.[125] As such, pursuant to section 1113(e), a debtor can make interim changes in collective bargaining agreements if the changes are "essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate."[126] The purpose of section 1113(e) is to enable the debtor to make immediate changes to a collective bargaining agreement that are essential to the debtor's short term survival. Accordingly, section 1113(e) focuses on changes that are essential to the continuation of the debtor's business or changes that are required to avoid irreparable harm. In contrast, 11 U.S.C. § 1113(b)(1)(A) provides for the permanent modifications of collective bargaining agreements, and thus, the focus is on necessary modifications which permit reorganization. The concept of a reorganization necessarily entails a much longer time frame than the immediate future. If the time frames were the same, then Congress would have used identical language in both sections 1113(b)(1)(A) and 1113(e). Thus, the Third Circuit is incorrect to state that under section 1113(b)(1)(A) only those modifications that are necessary to the debtor's short term survival are permissible.

Finally, the Third Circuit's interpretation is contrary to other provisions of the Code. Section 1129(a)(11) requires that all reorganization plans be confirmed only if the particular reorganization plan is feasible.[127] The feasibility requirement concerns the long term stability of a debtor.[128] The feasibility requirement is intended to ensure that a debtor will not require further bankruptcy relief after the confirmation of the case.[129] The Third Circuit fails to read section 1113(b)(1)(A) in conjunction with section 1129(a)(11). The phrase "necessary to permit reorganization" is connected to the feasibility requirement because the purpose of modifying a collective bargaining agreement is to permit the debtor to develop a feasible reorganization plan. Thus, the Third Circuit's unwillingness to examine the structure of the entire Code and develop an interpretation of section 1113, which is harmonious with the entire Code, is another defect of its opinion in *Wheeling-Pittsburgh Steel.*

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[125]Charlene R. Ehrenwerth & Maureen E. Lally-Green, *The New Bankruptcy Procedures For Rejection of Collective-Bargaining Agreements: Is The Pendulum Swinging Back?*, 23 DUQ. L. REV. 939, 968-69 (1985); Note, *Rejection of Collective Bargaining Agreements Under the Bankruptcy Amendments of 1984*, 71 VA. L. REV. 983, 1006 (1985).

[126]11 U.S.C. § 1113(e) (1988).

[127]11 U.S.C. § 1129(a)(11) (1988).

[128]5 COLLIER ON BANKRUPTCY 1129.02[11] (L. King 15th ed. 1994); PATRICK A. MURPHY, CREDITORS' RIGHTS IN BANKRUPTCY § 17-11 (2d ed. 1989).

[129]WEINTRAUB & RESNICK, *supra* note 69, ¶ 8.23[2]; RICHARD F. BROUDE, REORGANIZATIONS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE § 12.14 (1991).

The *Wheeling-Pittsburgh Steel* decision demonstrates that the use of legislative history can be deceptive and misleading. Reliance on legislative history can enable a court to craft an opinion reaching the conclusion that it desires because it can rely on the statements of individual legislators that are favorable to the position that the court desires to advance. The weakness of legislative history is readily seen when the legislative history expressly contradicts the legislation that was enacted. Under these circumstances, reference to legislative history for support of the interpretation of a statute is disingenuous because the court is laboring to attain a desired result. The language of the particular statute and the entire Code provide the clearest indication of what Congress intended because the legislators voted on the particular provision. Although some legislators thought that they were overruling the substantive requirements for the rejection of collective bargaining agreements, the text they adopted embodied the substantive standard adopted by the Supreme Court in *Bildisco*. Thus, in *Wheeling-Pittsburgh Steel*, the plain meaning of section 1113 should have prevailed because it was only the legislation that was enacted.

E. Predictability and Reliability

Strict statutory interpretation also provides debtors and creditors with predictability in the enforcement of bankruptcy statutes. For example, a majority of courts have strictly construed sections 544(a)(1)[130] and 544(a)(3),[131] and these courts have held that a trustee is not subject to equitable defenses such as a constructive trust or equitable estoppel when he uses the strong arm powers.[132] Sections 544(a)(1) and 544(a)(3) are based on the policy of ostensible

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[130]Section 544(a)(1) states:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-
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> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists; . . .

11 U.S.C. § 544(a)(1) (1988).

[131]Section 544(a)(3) states:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-
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> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such purchaser exists.

11 U.S.C. § 544(a)(3) (1988).

ownership.[133] In *Belisle v. Plunkett*[134] a debtor formed five partnerships to raise funds for the purchase of a shopping center lease in the Virgin Islands. The debtor used partnership funds to purchase the lease; however, the debtor recorded the lease in his own name. Thereafter, debtor and his wife filed bankruptcy petitions. The issue before the Seventh Circuit was whether a trustee may bring into the bankruptcy estate property that the debtor holds in constructive trust for victims of fraud.

The Seventh Circuit held that under section 544(a)(3) the leasehold was property of the estate.[135] Since section 544(a)(3) grants a trustee the status of a bona fide purchaser,[136] and a bona fide purchaser of the leasehold interest, without notice of the earlier claim, would take ahead of a person who has not recorded his interest.[137] It follows that, a trustee, acting as a bona fide purchaser, is entitled to avoid the interests of the partners who had failed to record their interests.[138]

The court also rejected the argument that under section 541(d) the leasehold was not part of the estate because the estate does not include property in which a debtor holds bare legal title.[139] Section 544(a)(3) permits a trustee to bring into the estate certain property that ostensibly belongs to the estate.[140] Under

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[132]The majority position is that a trustee using § 544(a) is not subject to the affirmative defense of a constructive trust. *E.g., In re* Seaway Express Corp., 912 F.2d 1125 (9th Cir. 1990); Belisle v. Plunkett, 877 F.2d 512 (7th Cir.), *cert. denied*, 493 U.S. 893 (1989); *In re* Tleel, 876 F.2d 769 (9th Cir. 1989); *In re* Anderson, 30 Bankr. 995 (M.D. Tenn. 1983); *In re* Elin, 20 Bankr. 1012 (D.N.J. 1982), *aff'd without opinion*, 707 F.2d 1400 (3d Cir. 1983); *In re* Cascade Oil Co., 65 Bankr. 35 (Bankr. D. Kan. 1986); *In re* Dlott, 43 Bankr. 789 (Bankr. D. Mass. 1983); *In re* Great Plains Western Ranch Co., 38 Bankr. 899 (Bankr. C.D. Cal. 1984). The minority position is that property held pursuant to a constructive trust is invulnerable to the application of § 544(a). *E.g., In re* Howard's Appliance Corp., 874 F.2d 88 (2d Cir. 1989); *In re* Quality Holstein Leasing, 752 F.2d 1009 (5th Cir. 1985); *In re* Triple A Coal Co., 55 Bankr. 806 (Bankr. S.D. Ohio 1985); *In re* Earl Ruggenbuck Farms, Inc., 51 Bankr. 913 (Bankr. E.D. Mich. 1985).

[133]One court has written:

> There seem to be at least two important reasons why the idea of ostensible ownership bulks so large in bankruptcy law. First, it helps to police against fraud on the part of debtors-fraud that may occur with or without the collusion of creditors. Secondly, quite apart from any imputation of fraud, it helps to permit the kind of reliance said to be essential to a dynamic commercial economy.

In re Great Plains Western Ranch Co., 38 B.R. 899, 904 (Bankr. C.D. Cal. 1984).

[134]877 F.2d 512 (7th Cir.), *cert denied*, 493 U.S. 893 (1989).

[135]*Id.* at 516.

[136]*Id.* at 513.

[137]*Id.* at 514.

[138]*Id.*

[139]*Belisle*, 877 F.2d at 514-15.

[140]*Id.*

most recording statutes a purchaser in good faith of real property can obtain a superior position to the rightful owner, if the rightful owner fails to record its interest.[141] Section 544(a)(3) grants a trustee the status of a bona fide purchaser without notice which allows a trustee to prevail over an entity that has neglected to observe the local recording statutes.[142] Under section 544(a)(3), the trustee was able to avoid the interests of the partners.[143]

The court also rejected the argument that section 541(d)[144] placed a restriction on the trustee's strong arm powers.[145] Section 541(d) does not place a limitation on section 544(a)(3).[146] Section 541(d) is silent concerning whether property obtained through Code provisions, other than section 541, can become property of the estate.[147] Therefore, section 541(d) did not preclude the trustee from employing section 544(a)(3) to avoid the partners' interests in the leasehold.[148]

The preceding discussion reflects that strict statutory construction of unambiguous bankruptcy statutes is necessary to the operation of our economy. Strict construction facilitates the operation of recording statutes and the granting of credit because it produces reliability. Although the strict enforcement of the recording statutes may have been unfair to the defrauded

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[141] *Id.* at 515.

[142] *Id.*

[143] The court remarked:

> A bona fide purchaser from Plunkett would have taken ahead of the partners under local law. They neglected to record the partnerships' interest, though recording is easy.(The partners could, and in retrospect should, have refused to invest funds except through an escrow agent, who would have held the cash until good title had been recorded in the partnerships' names.) One of Plunkett's creditors, extending $100,000 against a collateral assignment of the leasehold, actually obtained a position superior to that of the partners. The trustee claimed the same position for the estate (meaning the creditors collectively, including the partners).

Id.

[144] Section 541(d) states:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d) (1988).

[145] *Belisle*, 877 F.2d at 515-16.

[146] *Id.*

[147] *Id.*

[148] *Id.*

partners, establishing an equitable exception would have weakened the reliability of the recording statutes and would have invited secret liens and fraud. Strict construction led to the enforcement of the policy of ostensible ownership, which is intended to combat secret liens and fraud. The strict construction of section 544(a)(3) led to the implementation of the policy of ostensible ownership, and thereby, produced reliability and predictability in the operation of the recording statutes. If attorneys and businesspeople understand that bankruptcy statutes will be strictly enforced then they can easily plan their transactions. An attorney who records his or her client's interest correctly will not have to worry whether there are any equitable exceptions that can destroy the validity of his or her client's interest. Therefore, strict statutory construction produces reliability and predictability that is essential to the operation of our economy.

F. Strict Statutory Construction Is Consistent with Commercial Law Policy

Strict statutory construction is also consistent with the policies underlying commercial law. One of the goals of the Uniform Commercial Code (hereinafter U.C.C.) is to streamline, clarify, and modernize commercial law.[149] U.C.C. § 1-103 governs the use of equity in cases controlled by the U.C.C.[150] and provides that a court may not use equity to override a particular section of the U.C.C.[151] Courts have been adverse to using U.C.C. § 1-103 to overrule express provisions of Article Nine of the U.C.C.[152] For example, in *Uniroyal, Inc. v.*

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[149]U.C.C. § 1-102(a); A.M. Knitwear Corp. v. All America Export-Import Corp., 359 N.E.2d 342, 346 (1976); 1 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 1-102:45 (3d ed. 1981).

[150]U.C.C. Section 1-103 states:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law of merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

U.C.C. § 1-103; *see also* THOMAS M. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 1-103[A](1978).

[151]Arcon Constr. Co. v. South Dakota Cement Plant, 349 N.W.2d 407, 412 (S.D. 1984)("In other words, general principles of law may only supplement the UCC to the extent they are not displaced; they will not be applied where they conflict with particular provisions of the UCC."); *see also* Farmers Livestock Exch. v. Ulmer, 393 N.W.2d 65, 70 (N.D. 1986); Kelly v. Miller, 575 P.2d 1221, 1224 (Alaska 1978); Central Nat'l Bank & Trust Co. v. Community Bank & Trust, 528 P.2d 710, 713 (Okla. 1974); National Shawmut Bank v. Vera, 223 N.E.2d 515, 518 (Mass. 1967); First Nat'l Bank v. Olsen, 403 N.W.2d 661, 666 (Minn. Ct. App. 1987); Palmer v. Idaho Peterbilt, Inc., 641 P.2d 346, 347-48 (Idaho Ct. App. 1982).

[152]*In re* California Pump & Mfg. Co., 588 F.2d 717 (9th Cir. 1978); Uniroyal, Inc. v. Universal Tire & Auto Supply Co., 557 F.2d 22 (1st Cir. 1977); *In re* Pacific Trencher & Equip., Inc., 27 Bankr. 167 (Bankr. 9th Cir. 1983), *aff'd*, 735 F.2d 362 (9th Cir. 1984).

Universal Tire & Auto Supply Co.[153] the issue before the First Circuit was whether Uniroyal, Inc., had a perfected security interest. Uniroyal filed a financing statement with the Secretary of the Commonwealth of Massachusetts and with the Clerk of the City of Boston. The debtor's sole place of business was in Brookline, which was just over the Boston-Brookline boundary. Since Uniroyal did not file in Brookline, the First Circuit held that Uniroyal had an unperfected security interest.[154] The First Circuit reasoned that the Article Nine filing requirements were clear, and that Uniroyal had failed to comply with them because it failed to file in Brookline.[155] The court also rejected Uniroyal's equitable arguments, and it stated:

> Uniroyal has come up with no workable rationale for judicial balancing of equities here, and the precedent either explicitly or implicitly rejects that approach to enforcing the Code. Efforts by courts to fashion equitable solutions to mitigate hardship on particular creditors of literal application of statutory filing requirements would have the deleterious effect of undermining the reliance which can be placed on them. The harm would be more serious than the occasional harshness resulting from strict enforcement.[156]

The First Circuit's opinion embodies the belief that predictability is a vital element of commercial law. The goal of predictability and reliability would be undermined if courts were at liberty to deviate from the express text of the U.C.C. The strict application of the law can produce harsh results. Nevertheless, applying the U.C.C. inconsistently would wreak chaos and destroy the purpose of enacting a comprehensive code that governs commercial law.

Strict statutory construction in the context of bankruptcy law is an extension of limiting the use of equity to override the express provisions of the U.C.C. Bankruptcy is intended to provide a centralized forum in which creditors can deal with a debtor who has committed multiple contractual defaults. In order to have an efficient system, it is vital that the law be uniform so that the results will be predictable, facilitating business planning and avoiding costly and vexatious litigation. If the results in bankruptcy are dependent upon a judge's sense of equity, then creditors might be adverse to participating in bankruptcy cases because the outcome might be too risky or unpredictable. Further, some debtors might be reluctant to file for bankruptcy because some judges might be perceived as too procreditor and anti-debtor. Strict statutory construction acts to ensure that the laws enacted by the legislature will be followed, and the entitlements to property set forth in the U.C.C. and other nonbankruptcy law

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[153]557 F.2d 22 (1st Cir. 1977).

[154]*Id.* at 23.

[155]*Id.*

[156]*Id.* (citations omitted).

will be observed in bankruptcy cases. Hence, strict statutory interpretation is fundamental to the operation of bankruptcy and commercial law.

G. Strict Statutory Construction Precludes a Bankruptcy Court from Using its Equitable Powers to Disregard the Clear Provisions of the Code

Strict statutory construction also limits a bankruptcy court's ability to employ equity to circumvent the clear dictates of a statute. If a court is permitted to use equity to disregard the clear terms of a statute, then it can decide cases on the particular facts and make every decision an equitable decision. Legislation would fall prey to the whims of the particular judge, and the rule of law would be eviscerated.

For example, in *Norwest Bank Worthington v. Ahlers*[157] the respondents were family farmers who owed the Norwest Bank Worthington more than $1,000,000. The respondents proposed a reorganization plan which permitted them to retain their property. The petitioners contended that the respondents' reorganization plan violated the absolute priority rule.[158] The respondents asserted the reorganization plan satisfied the new value exception to the absolute priority rule because they were willing to contribute their labor, experience and expertise in operating the farm. The Court had to determine whether the respondents' pledge of their labor, experience and expertise permitted the confirmation of their Chapter 11 case, even though their reorganization plan violated the absolute priority rule. The Court held that the respondents' promise of their future labor did not constitute an exception to the absolute priority rule, and therefore, the Chapter 11 case should not have been confirmed.[159] The proposed reorganization plan violated the absolute priority rule as codified in section 1129(b)(2)(B)(ii).[160] The respondents attempted to advance various equitable arguments to justify the confirmation of their reorganization plan; however, the Court rejected those arguments.[161] The Court stated:

> The short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.[162]

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[157] 485 U.S. 197 (1988).

[158] Section 1129(b)(2)(B)(ii) states:
> the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B)(ii) (1988).

[159] 485 U.S. at 199.

[160] *Id.* at 202.

[161] *Id.* at 206-07.

[162] *Id.* at 206.

The Code permitted the creditors to reject the plan, and it was not for the courts to override the creditors' decision.[163] Rather, it was incumbent upon the judiciary to effectuate the provisions of the Code.[164]

The problem with employing equity to disregard clearly written statutes is that it would produce havoc. A court would be able to consider the relative equities of a case and render a decision that it thought was fair. A court's decision would not be based on the letter of law. It would make it more difficult for parties to plan their transactions because the outcome in bankruptcy court would be dependent upon the judge's sense of fairness. The law could become incoherent because many decisions would be fact specific. Strict statutory construction is beneficial because it restricts a court's equitable powers and compels the court to act within the dictates of the Code.

H. Strict Statutory Construction Prevents a Bankruptcy Court from Employing its Equitable Powers to Create Substantive Rights

Strict statutory construction precludes a court from disregarding the express language of a bankruptcy statute from using equity to create substantive entitlements. In *Gillis v. California*,[165] a receiver was required by state law to obtain a bond to operate the business. Unable to secure the bond, the receiver requested permission from the district court to operate the business. Even though 28 U.S.C. § 65 required a receiver to comply with all applicable local and state health and safety statutes, the district court authorized the receiver to operate the business without a bond. The Supreme Court held that the district court lacked the jurisdiction to authorize the operation of the business.[166] The Court reasoned that Congress had the authority to restrict the district court's jurisdiction over receivers.[167] Judicial Code section 65 restricted the district court's jurisdiction.[168] There was no reason to preempt state law because state law was not repugnant to federal law.[169] A district court lacked authority to use its equitable powers to disregard the explicit provisions concerning the operation of receiverships.[170] Therefore, absent a grant of

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[163] *Id.* at 207.

[164] 485 U.S. at 207.

[165] 293 U.S. 62 (1934).

[166] *Id.* at 65.

[167] *Id.* at 66.

[168] *Id.*

[169] *Id.*

[170] The Court stated:

> The accepted doctrine is that the lower federal courts were created by the Acts of Congress and their powers and duties depend upon the acts which called them into existence, or subsequent ones which extend or limit. What ever may be the inherent power of a court incident to a grant of jurisdiction

authority from Congress, a district court lacked the authority to create substantive entitlements that were in contravention of federal and state law.

Gillis is significant because many businesses are subject to government regulation. Bankruptcy is intended to govern debtor-creditor relationships, not to permit a debtor to evade legitimate government regulation. Therefore, the Code permits administrative agencies to enforce health and safety laws against debtors.[171] If a court is permitted to disregard the text of clear statutes, then a court could use its inherent equitable powers to create substantive entitlements such as licenses and permits. The effect would be that the bankruptcy court, although it lacked the expertise, would be a super administrative agency granting permits and licenses. Not only would this violate the separation of powers and federalism doctrines, but also it could imperil public safety. Consequently, strict statutory construction is vital to insure that bankruptcy courts will not circumvent government regulation and create substantive entitlements.

Similarly in *Johnson v. First National Bank of Montevideo, Minnesota*,[172] the debtors sought an injunction to toll indefinitely the expiration of the statutory period of redemption. The debtors alleged that they had equity in their property. Under state law the debtors had one year after the foreclosure sale to redeem their property. Section 108(b) granted the debtors a sixty-day extension of the state redemption period. The bankruptcy court issued an injunction, which indefinitely suspended the statutory period of redemption, and the district court affirmed the decision.

The Eighth Circuit held that a bankruptcy court may not use its equitable powers under section 105(a) to toll the expiration of the statutory redemption period created under state law in connection with real estate mortgages.[173] It noted that, although, section 105(a) vested a bankruptcy court with broad equitable powers,[174] this provision was not unlimited, especially when property rights created and defined by state law are concerned.[175] Further, unless there is conflict between state and federal law, state law governs the issue

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> . . . there seems no ground whatever for saying that Congress cannot withhold or withdraw from courts of equity the right to empower receivers in conservation proceedings to disregard local statutes.

293 U.S. at 66 (citations omitted).

171 *See* 11 U.S.C. §§ 362(b)(4) - 362(b)(5) (1988); 28 U.S.C. § 959(b) (1988).

172 719 F.2d 270 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984).

173 *Id.* at 278-79.

174 *Id.* at 273.

175 The court stated:

> Although § 105(a) is in certain respects broader in scope than its predecessor, the general equitable powers granted to the bankruptcy court by the statute are not unlimited, particularly in instances where property rights created and defined by state law are involved.

Id.

of property rights.[176] In *Butner v. United States*,[177] the Supreme Court held that in a bankruptcy case property rights are created and defined by nonbankruptcy law, which is usually state law.[178] Therefore, under *Butner*, absent a specific grant of power from Congress or extraordinary circumstances, a bankruptcy court may not exercise its equitable powers to create substantive rights which do not exist under state law.[179]

The Eighth Circuit concluded that a bankruptcy court may not employ section 105(a) to toll the running of the statutory redemption period,[180] and that the case lacked the exceptional circumstances necessary to invoke the equitable power of the bankruptcy court.[181] Moreover, the debtors failed to identify any federal interest which would justify interfering with state law.[182] The court held that the bankruptcy court erred in using section 105(a) to suspend the running of the statutory redemption period.[183]

As the preceding discussion reflects, a bankruptcy court, like all federal courts, is a court of limited jurisdiction. Strict statutory construction insures that a bankruptcy court will exercise its jurisdiction within the boundaries delineated by Congress, prevents a bankruptcy court from exercising its equitable powers beyond the limits set forth in the Code, and thereby,

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[176]The Eighth Circuit wrote:

> Article I, section 8 of the United States Constitution provides that Congress shall have the power to establish uniform bankruptcy laws throughout the United States. Where Congress has chosen to exercise its authority, contrary provisions of state law must accordingly give way. It is equally well-settled, however, that state laws are suspended only to the extent of actual conflict with the bankruptcy system provided by Congress, so that in the absence of any actual conflict between state and bankruptcy laws, the law of the state where the property is situated governs questions of property rights.

Id.

[177]440 U.S. 48 (1979).

[178]*Johnson*, 719 F.2d at 273-74.

[179]The court remarked:

> To conclude otherwise, and thus to hold that a bankruptcy court may as a matter of course, suspend the running of a statutory period of redemption pursuant to § 105(a), would be to enlarge the debtor's property rights beyond those specifically set forth by the Minnesota legislature and by Congress in § 108(b). Despite the broad equitable powers bestowed by § 105(a), we therefore find ourselves in agreement with those courts which have held that § 105(a) may not be invoked to toll or suspend the running of a statutory period of redemption absent, fraud, mistake, accident, or erroneous conduct on the part of the foreclosing officer.

Id. at 274.

[180]*Id.*

[181]*Id.*

[182]*Id.* at 275.

[183]*Johnson*, 719 F.2d at 275.

unnecessarily preempting state law, and hinders a bankruptcy court from creating substantive entitlements. Unregulated discretion would enable a bankruptcy court to disregard federal and state law and create substantive entitlements, which is contrary to bankruptcy policy.[184] A court's decision would be dependent upon who was the judge, rather than upon the dictates of the Code. Creditors and debtors would be adverse to participating in bankruptcy cases because creditors or debtors could receive windfalls, which would destroy the collective nature of bankruptcy.[185] Thus, an important policy which holds that bankruptcy should be a mechanism for enforcing entitlements against a debtor's property would be severely undermined.

I. Congressional Action Can Remedy Unpopular or Incorrect Decisions

Congress may not have envisioned that when it enacted a particular law it would be applied to a particular situation. Under these circumstances, the strict application of the law might produce unpopular results. When Congress thinks that the judiciary has misinterpreted the Code, Congress has the option of enacting legislation to overrule a judicial decision.

In *NLRB v. Bildisco & Bildisco*,[186] the debtor obtained permission from the bankruptcy court to reject a collective bargaining agreement with Local 408 of the International Brotherhood of Teamsters (hereinafter Local 408). The debtor had also unilaterally modified the terms of its collective bargaining agreement with Local 408.[187] The Supreme Court granted certiorari to determine what was the correct standard for determining whether a collective bargaining agreement should be rejected and to determine other important bankruptcy and labor law issues.[188] The Court held that collective bargaining agreements could be rejected under 11 U.S.C. § 365(a).[189] The Court also held that the balancing of the equities was the correct standard for determining whether a collective bargaining agreement should be rejected.[190] Finally, the Court ruled

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[184]The Supreme Court has stated:

> Property interest are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'

Butner v. United States, 440 U.S. 48, 55 (1979).

[185]JACKSON, *supra* note 2, at 20-21.

[186]465 U.S. 513 (1984).

[187]*Id.*

[188]*Id.*

[189]*Id.* at 521-23.

[190]*Id.* at 523-27.

that a debtor did not commit an unfair labor practice when it unilaterally modified the terms of a collective bargaining agreement.[191]

Organized labor thought that the *Bildisco* decision was horrendous, and it immediately sought legislation to overrule it.[192] Within five months after *Bildisco* was decided, organized labor and its supporters were able to enact section 1113 which was intended to modify *Bildisco*.[193] Section 1113 sets forth a new procedure for modifying a collective bargaining agreement,[194] and it prohibits a debtor from unilaterally modifying a collective bargaining agreement.[195] In addition, section 1113(c) enacted a new substantive standard for the modification of collective bargaining agreements.[196] The enactment of section 1113 proves Congress can easily and quickly amend the Code when it disagrees with the Supreme Court's interpretation of the Code.

Another example of Congress legislatively overruling a controversial decision is *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*[197] In *Lubrizol* the debtor had entered into a nonexclusive technology licensing agreement with Lubrizol Enterprises, Inc. The debtor filed for Chapter 11 and sought to reject the technology licensing agreement with Lubrizol. The debtor attempted to reject the agreement so that it would be able to sell or license the technology without being hindered by the restrictive provisions of the Lubrizol agreement. The Court of Appeals for the Fourth Circuit held that the agreement was executory, and therefore, it was within the purview of section 365(a).[198] The Fourth Circuit, moreover, ruled that under the business judgment test, the debtor was entitled to reject the agreement because the estate would benefit

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[191] 465 U.S. at 532-34.

[192] Rosiland Rosenberg, *Bankruptcy and the Collective Bargaining Agreement - A Brief Lesson in the Use of The Constitutional System of Checks and Balances*, 58 AM. BANKR. L. J. 293, 294 (1984).

[193] Carlos J. Cuevas, *Necessary Modifications and Section 1113 of the Bankruptcy Code: A Search for the Substantive Standard for Modification of a Collective Bargaining Agreement in a Corporate Reorganization*, 64 AM. BANKR. L. J. 133, 162-63 (1990); Judith DeMeester Nichols, Note, *Rejection of Collective Bargaining Agreements by Chapter 11 Debtors: The Necessity Requirement Under Section 1113*, 21 GA. L. REV. 967, 986 (1987).

[194] Ehrenwerth & Lally-Green, *supra* note 125, at 950-51.

[195] 11 U.S.C. § 1113(f) (1988).

[196] Richard H. Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L. J. 325, 335 (1984); Mark S. Pulliam, *The Collision of Labor and Bankruptcy Law: Bildisco and the Legislative Response*, 1985 LABOR L. J. 390, 397-98.

Under § 1113(c) a debtor must make a proposal that satisfies the requirements of § 1113(b)(1); the authorized representative must have rejected the proposal without good cause; and the balance of the equities must clearly favor the rejection of the collective bargaining agreement. 11 U.S.C. § 1113(c) (1988).

[197] 756 F.2d 1043 (4th Cir. 1985).

[198] *Id.* at 1046.

from the rejection of the agreement.[199] The court strictly construed section 365(a) and was adverse to creating any exceptions for technology licensing agreements.[200] The court reasoned that no matter how harsh the consequences, it was not within the judiciary's power to deviate from the clear language of a statute.[201]

The *Lubrizol* decision generated a significant amount of controversy. Businesses that were dependent upon technology licensing agreements viewed themselves as extremely vulnerable because the contracts upon which their companies were founded could be easily rejected in bankruptcy cases. The *Lubrizol* case led to an effort to create a special provision for the rejection of technology licensing agreements.[202] Congress enacted section 365(n) to overrule the *Lubrizol* decision.[203] The purpose of section 365(n) is to mitigate the damage that could result to a licensee when a licensor rejected a technology licensing agreement.

The literal interpretation of statutes can have harsh consequences. Courts sometimes will have to apply statutes to situations which were not foreseen by the legislature at the time the legislation was enacted. Nonetheless, if a court issues a harsh decision because the results are considered inequitable or contrary to public policy, then Congress can enact a new law and overrule the judicial decision. As the section concerning public choice theory illustrates, parties adversely affected by bankruptcy decisions can lobby Congress to enact

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199 *Id.* at 1047.

200 *Id.* at 1045.

201 The court wrote:

> It cannot be gainsaid that allowing rejection of such contracts as executoryimposes serious burdens upon contracting parties such as Lubrizol. Nor can it be doubted that allowing rejection in this and comparable cases could have a general chilling effect upon the willingness of such parties to contract at all with businesses in possible financial difficulty. But under bankruptcy law such equitable considerations may not be indulged by courts in respect of the type of contract here in issue. Congress has plainly provided for the rejection of executory contracts, notwithstanding the obvious adverse consequences for contracting parties thereby made inevitable. Awareness by Congress of those consequences is indeed specifically reflected in the special treatment accorded to union members under collective bargaining contracts . . . and to lessees of real property . . . But no comparable special treatment is provided for technology licensees such as Lubrizol. They share the general hazards created by § 365 for all business entities dealing with potential bankrupts in the respects at issue here.

Id. at 1048.

202 S. REP. NO. 505, 100th Cong., 2d Sess. 2, 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3203.

203 WEINTRAUB & RESNICK, *supra* note 69, ¶ 7.10[11]; John J. Fry, Note, *The Rejection of Executory Contracts Under the Intellectual Property Bankruptcy Protection Act of 1988*, 37 CLEV. ST. L. REV. 621, 622 (1989).

legislation overruling the bankruptcy decision. Indeed, public choice theory predicts that the interested parties will intensely lobby Congress to enact new legislation.

Congress has the resources to study problems caused by bankruptcy decisions that should be addressed by legislation. If a judicial decision does produce a problem, Congress can address the particular issue or it can address the issue in a comprehensive manner by enacting legislation that will not only deal with the issue but also with any collateral issues that involve the entire Code.

IV. THE SHORTCOMINGS OF STRICT STATUTORY INTERPRETATION

A. Introduction

This section examines the problems that strict statutory interpretation can produce. In particular, strict statutory construction does not work well when a public policy issue is involved. Further, an unrelenting adherence to strict statutory interpretation can produce absurd results and inhibit the development of bankruptcy law. Strict statutory interpretation also requires that Congress be willing to constantly amend the bankruptcy laws, which can be an unrealistic expectation. Finally, plain meaning can produce incorrect results because a literalist approach can produce an incorrect interpretation of a statute.

B. Plain Meaning Can Produce Horrendous Results Because the Court Is Constrained to Ignore the Policy Implications of its Decision

Strict statutory interpretation works well in the context of commercial law because it produces the predictability and reliability that is necessary for our economy to function. However, it can produce terrible policy results when it precludes a court from considering the policy implications of its decision. For example, in *Pennsylvania Department of Public Welfare v. Davenport*[204] the respondents pleaded guilty to welfare fraud. As part of a condition of probation, the respondents were ordered to make monthly restitution payments to the county probation department, which would forward the payments to the Pennsylvania Department of Public Welfare. The issue before the Court was whether criminal restitution obligations were dischargeable in Chapter 13 cases.[205] The Supreme Court held that, based on the language and structure of the Code, criminal restitution obligations were dischargeable in Chapter 13 cases.[206] Under section 101(11) a debt was a liability on a claim, and this definition indicated that the meaning of debt and claim were synon-

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[204]495 U.S. 552 (1990).

[205]*Id.* at 555.

[206]*Id.*

ymous.[207] The concept of claim was not restrictive, but rather, it was expansive.[208] The Court rejected the petitioners' argument that criminal restitution orders were not a right to payment under the Court's prior decision in *Kelly v. Robinson*.[209] Instead, given the plain meaning of section 101(4)(A), the Supreme Court concluded that criminal restitution orders came within the purview of the statute.[210] Congress, apparently, made a conscious decision in permitting the discharge of criminal restitution obligations by making section 523(a)(7) inapplicable to Chapter 13 cases.[211] Thus, the Court concluded that criminal restitution obligations were dischargeable in Chapter 13 cases.

Davenport was an invitation for criminals to file for Chapter 13 so that they could discharge their criminal restitution obligations. The Court failed to consider the policy implications and consequences of its decision because in interpreting the statute it solely used the plain meaning of the text. Congress made a policy decision that it would afford a Chapter 13 debtor a more liberal discharge.[212] The Court was going to enforce that policy decision. As *Davenport* reflects, strict statutory construction leaves the court, as the agent of Congress, with little discretion to make the law adapt to the needs of society.

In strictly construing the statute, the Court ignored two important policies underlying bankruptcy. First, criminal restitution obligations historically have been held to be nondischargeable in bankruptcy cases.[213] Secondly, federal

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[207] *Id.* at 558.

[208] *Id.*

[209] 479 U.S. 36 (1986).

[210] Justice Marshall stated:

> Contrary to petitioners' argument, however, the Court's prior characterization of the purposes underlying restitution orders does not bear on our construction of the phrase 'right to payment' in § 101(4)(A). The Court in *Kelly* analyzed the purposes of restitution in construing the qualifying clauses of § 523(a)(7), which explicitly tie the application of that provision to the purpose of the compensation required. But the language employed to define 'claim' in § 101(4)(A) makes no reference to purpose. The plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation.

495 U.S. at 559.

[211] *Id.* at 562-63.

[212] At the time *Davenport* was determined criminal restitution obligations were nondischargeable in Chapter 7. Kelly v. Robinson, 479 U.S. 36 (1986); 11 U.S.C. § 523(a)(7) (1988). In addition, certain provisions, §§ 523(a)(2),(a)(4), (a)(6) and (a)(8) which prohibited the discharge of certain debts were not applicable in Chapter 13. Congress made a deliberate decision to make the Chapter 13 discharge provisions more liberal than the discharge provisions in Chapter 7.

[213] Kelly v. Robinson, 479 U.S. 36, 45-46 (1986). In *Kelly*, the Court quoted a New York Supreme Court's language in State v. Mosesson:

> A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence. A bankruptcy proceeding is civil in

courts have been adverse to interfering with state criminal proceedings.[214] In the past, the Court has been unwilling to infer such a radical departure from prior practice unless Congress unequivocally indicates that it has repealed the preexisting common law.[215] There was no cogent evidence that Congress repealed the exception to criminal restitution obligations. The Court could have avoided using strict statutory construction. Subsequently, Congress enacted legislation which legislatively overruled *Davenport*.[216]

C. Strict Statutory Interpretation May Produce Absurd Results

Another difficulty with strict statutory interpretation is that the literal application of the law may produce absurd results. This result may be the case even when there is no significant public policy issue involved in the litigation. For example, Congress enacted section 365(d)(4) as part of the 1984 amendments.[217] There has been a dispute as to whether a debtor must have the entire motion adjudicated within the initial sixty day period after the entry

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> nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew. A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor-creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a lawabiding life thereafter. State v. Mosesson, 78 Misc.2d 217, 218, 356 N.Y.S.2d, 483 483-84 (Sup. Ct. N.Y. Cty. 1974).

479 U.S. at 46.

[214]The Court has stated:

> Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly 'the fundamental policy against federal interference with state criminal prosecutions.' Younger v. Harris, 401 U.S. 37, 46 (1971).

Kelly, 479 U.S. at 47.

[215]Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986).

[216]Congress amended the Bankruptcy Code in 1990, and criminal restitution obligations are nondischargeable in Chapter 13. 11 U.S.C. § 1328(a)(3) (1988).

[217]Section 365(d)(4) states:

> Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4) (1988).

of the order for relief or whether it is sufficient if the motion is simply made within the initial sixty day period after the entry of the order for relief.[218]

The minority position, as reflected in *In re House of Deals of Broward, Inc.*[219] is that the motion must be adjudicated within the initial sixty day period. In *House of Deals* the debtor filed for Chapter 11 on May 19, 1986. Thereafter, on July 17, 1986, the debtor moved by order to show cause for an order extending its time to assume or reject a sublease. The court heard the motion on August 6, 1986. The court held that the lease was deemed rejected by operation of law because the motion was not adjudicated within the sixty day period after the entry of the order for relief.[220] The court ruled that language of the statute was clear.[221] The word "assumption" not only required that the debtor make the motion, but also required that the court grant the motion within the initial sixty day period.[222] The court would not adopt a different interpretation because it thought that its interpretation of the provision was consistent with the legislative history of the statute.[223]

The problem with the court's rigid interpretation of section 365(d)(4) was that there were two highly plausible interpretations of the statute. The interpretation the court rejected would not have produced an arbitrary result, and still would have effectuated congressional intent. The majority view is that to satisfy section 365(d)(4) one has to make a motion prior to the expiration of the sixty day period.[224] The language of the statute can be read as to only require the making of a motion within the sixty day period.[225] The major problem is that the minority position's interpretation would produce arbitrary

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[218]A majority of courts have held that under § 365(d)(4) it is sufficient if the trustee serves a motion within the initial sixty day period. *E.g., In re* American Healthcare Management, Inc., 900 F.2d 827, 833 (5th Cir. 1990); *In re* Victoria Station, Inc., 875 F.2d 1380, 1386 (9th Cir. 1989); *In re* Southwest Aircraft Servs., Inc., 831 F.2d 848, 853 (9th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988); *In re* Southern Technical College, Inc., 148 B.R. 550, 551-52 (Bankr. E.D. Ark. 1992); *In re* Perfectlite Co., 116 B.R. 84, 88 (Bankr. N.D. Ohio 1990); *In re* Garrett Rd. Supermarket, Inc., 95 B.R. 902, 903 (Bankr. E.D. Pa. 1989); *In re* By-Rite Distrib., Inc., 55 B.R. 740, 745 (Bankr. D. Utah 1985); *In re* Wedtech Corp., 72 B.R. 464, 468 (Bankr. S.D.N.Y. 1987). The minority position is that to comply with § 365(d)(4) a motion has to be served and adjudicated within the initial sixty day period after the entry of the motion for relief. *E.g., In re* House of Deals of Broward, Inc., 67 B.R. 23, 24 (Bankr. E.D.N.Y. 1986); *In re* Coastal Indus., Inc., 58 B.R. 48, 51 (Bankr. D.N.J. 1986).

[219]67 B.R. at 25.

[220]*Id.* at 24-25.

[221]*Id.* at 24.

[222]*Id.* at 25.

[223]*Id.*

[224]*In re* Southwest Aircraft Servs., Inc., 831 F.2d 848, 849 (9th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988).

[225]*Id.* at 850.

results.[226] It is conceivable that a debtor could make a motion the day it filed for Chapter 11; however, due to calendar congestion, the debtor might be unable to obtain a return date for its motion until after the termination of the sixty day period. The debtor would automatically forfeit its lease. The debtor could lose a major asset, and the landlord receive a windfall due to circumstances beyond the debtor's control. A lease forfeiture could also harm the unsecured creditors because the lease might be the estate's most valuable asset. The unsecured creditors might depend on the sale of the lease as the means of funding a plan. If there are two plausible interpretations of a statute, a court should select the interpretation which avoids producing the harsher result.[227] There should not be a blind adherence to strict statutory construction because an unrelenting adherence to strict statutory construction can produce harsh and arbitrary results.

D. Strict Statutory Construction May Inhibit the Development of Bankruptcy Law and Policy

When Congress enacts particular bankruptcy legislation it cannot envision all the circumstances that will arise from a dynamic economy. The plain meaning rule may inhibit the judiciary's ability to adapt to the changes in society because under plain meaning the court is restricted to the literal meaning of a statute. Under plain meaning the court is prohibited from engaging in dynamic[228] or nautical[229] statutory interpretation because the court would deviate from the plain meaning of the statute.

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[226]*Id.*

[227]Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 454 (1989); Grand *ex rel.* United States v. Northrop Corp., 811 F. Supp. 333, 335 (S.D. Ohio 1992). As Professor Sunstein has suggested the canons of construction are being used to supplement the text of a statute because the canons assist the judges in construing the statutes. Sunstein, *supra* note 57, at 452-53. In this case, the canon regarding the avoidance of absurd results acts as a gap filler to insure that the plausible construction that does not produce an arbitrary result is selected.

[228]Professor Eskridge has espoused the theory of dynamic statutory interpretation under which statutory interpretation involves the reconciliation of three factors: 1) the statutory text; 2) the original legislative expectations surrounding the enactment of the statute; and 3) the subsequent evolution of the statute in the context of the present. Eskridge, *supra* note 6, at 1483.

[229]The nautical theory has been described as the following:

> Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors, and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail. This model understands a statute as an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role. The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board.

T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1987).

A case that illustrates how strict statutory construction can inhibit the development of bankruptcy law is *Johnson v. Home State Bank*.[230] In *Johnson* the debtor entered into a loan transaction with the respondent. The debtor borrowed $470,000 from the respondent, and he gave the respondent a mortgage on farm property to secure the loan. The debtor defaulted on the loan, and the respondent commenced a foreclosure action. While the foreclosure proceeding was pending, the debtor filed for Chapter 7. The debtor obtained a discharge of his personal liability on his obligations to the respondent. The automatic stay was subsequently lifted in the Chapter 7 case, and the respondent obtained an *in rem* judgment for approximately $200,000. Before the foreclosure sale could take place, the debtor filed for Chapter 13. The debtor listed the mortgage against the farm property as a claim against his estate, and he proposed to pay the respondent's claim in his Chapter 13 plan. The bankruptcy court confirmed the debtor's Chapter 13 plan. The respondent appealed to the district court, and the district court reversed the bankruptcy court. The district court held that the Code did not permit a Chapter 13 debtor to include a mortgage for which the personal liability had been discharged in a Chapter 7 case. The Tenth Circuit Court of Appeals affirmed the district court. The Supreme Court granted certiorari to resolve a conflict among the Circuit Courts of Appeal.

The Supreme Court held that a debtor may include a mortgage lien in a Chapter 13 plan once the personal obligation secured by the mortgaged property has been discharged in a Chapter 7 case.[231] The Chapter 7 discharge only discharged the debtor's personal liability, and prevents a creditor from recovering any deficiency against the debtor's assets.[232] Nevertheless, the mortgagee's right to foreclose against the mortgaged property survives the Chapter 7 case.[233] The plain meaning of section 101(5) reflects that mortgage interest is a claim against the debtor.[234] This conclusion was buttressed by the Court's decision in *Pennsylvania Department of Public Welfare v. Davenport*,[235] in which the Court held that Congress intended to adopt the broadest possible definition of "claim"[236] as an enforceable obligation.[237] The Court concluded that a claim in bankruptcy embraced a mortgage interest, even though the

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[230]501 U.S. 78 (1991).

[231]*Id.* at 80.

[232]*Id.* at 82.

[233]*Id.* at 83.

[234]*Id.*

[235]495 U.S. 552 (1990).

[236]*Johnson*, 501 U.S. at 84.

[237]*Id.*

debtor's personal liability had been discharged.[238] Thus, the surviving mortgage interest is a claim.[239]

The Court also used holistic statutory construction, and it thought that its holding that a mortgage interest is a claim was consistent with other sections of the Code.[240] It found additional support for its holding in the legislative history of the Code because the legislative history reflected that Congress intended to expand the definition of a claim.[241] The Court, moreover, was adverse to prohibiting Chapter 20 cases because there was no indication that Congress intended to prohibit Chapter 20 cases.[242] The Court thought that the Code contained sufficient remedies, such as the good faith test, to police debtors who attempted to abuse Chapter 20.[243]

Basing its holding on the text and structure of the Code, the Court failed to address the policy ramifications, and therefore, missed an opportunity to develop bankruptcy jurisprudence. Chapter 20 is a recent phenomenon, and therefore, Congress did not address the problem when it enacted the Code. There is no evidence in the legislative history that Congress considered the problem of Chapter 20 and approved of the practice. The Court could have examined the Chapter 20 issue by exploring the good faith issue and the policies underlying the Code. For example, creditor protection and the protection of the creditor's bargain is an important policy which permeates bankruptcy.[244] Another significant policy underlying bankruptcy is equity, and

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[238]The Court stated:

> Even after the debtor's personal obligations have been extinguished, the mortgage holder still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can be viewed as a 'right to an equitable remedy' for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an 'enforceable obligation' of the debtor.

Id.

[239]*Id.* at 84-85.

[240]*Id.* at 85.

[241]*Johnson*, 501 U.S. at 85.

[242]The Court stated:

> Congress has expressly prohibited various forms of serial filings. The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganizations to a debtor who previously has filed for Chapter 7 relief.

Id. at 86 (citations omitted).

[243]*Id.* at 87.

[244]JACKSON, *supra* note 2, at 20-23.

that a debtor has to treat his or her creditors fairly and honestly.[245] Finally, there is the fresh start policy, which enables an honest debtor to discharge his or her debts and start anew.[246] The Court failed to discuss these policies and how these policies should be considered in the context of a Chapter 20 case.

In a Chapter 20 case, the debtor is able to discharge her unsecured debt and promissory note relating to the mortgage in the Chapter 7 case. Then in the Chapter 13 case the debtor is able to save her house by paying the mortgage arrearages in a Chapter 13 plan. Chapter 20 permits the debtor to discharge all of her unsecured debt and retain her most valuable asset, her residence. The debtor is permitted to have her cake and eat it. Under these circumstances, a debtor is not receiving a fresh start, but a head start. It is inequitable to permit a debtor to receive a Chapter 7 discharge, and then permit her to retain her home through a Chapter 13 plan. Furthermore, not only are the general unsecured creditors harmed, but also the mortgagee is harmed in Chapter 20 cases. As part of the mortgage transaction, the mortgagee bargained for the debtor's personal liability. If the value of the property decreases and the sale of the property fails to satisfy the outstanding debt, then the mortgagee should be permitted to pursue the debtor for the deficiency. This is simply what the parties bargained for in the mortgage transaction. Such exploitation of the bankruptcy process by a debtor is bad faith. If the debtor intends to use bankruptcy to save her house she should be compelled to file for Chapter 13, she should not have the option of using Chapter 20.

The Court, thus, missed an opportunity to make an important policy pronouncement regarding serial filings and the good faith requirement. Instead, it elected to mechanically interpret the Code, and thereby, stunt the development of bankruptcy policy. The Court should have engaged in either nautical[247] or dynamic[248] statutory interpretation. Congress failed to address the issue of whether Chapter 20 is permissible. One should not infer Congressional approval regarding Chapter 20 because of legislative silence as an indication that Congress has approved of Chapter 20 because there is no evidence in the text or legislative history that Congress has contemplated or debated the issue. The Court should have used the good faith test to determine whether Chapter 20 was permissible. The Court would not have been engaged in judicial legislation because Congress has expressed its disdain for serial filings,[249] and sections 1307(c) and 1325(a)(3) grant a court the authority to

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[245] WEINTRAUB & RESNICK, *supra* note 69, ¶ 1.02[1]; MARTIN J. BIENENSTOCK, BANKRUPTCY REORGANIZATION 2-3 (1987).

[246] DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 27-29 (1992); 2 DAVID G. EPSTEIN ET AL., BANKRUPTCY § 8.1 (1992).

[247] Aleinikoff, *supra* note 229, at 21.

[248] Eskridge, *supra* note 6, at 1483.

[249] Section 109(g) states:

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if-

determine the appropriateness of a filing and make policy. Hence, a rigid interpretation of the Code can stifle the development of bankruptcy law and policy.

Another example of how strict statutory construction restricts the development of bankruptcy law and policy is the treatment of technology licensing agreements. When Congress enacted the Code, technology licensing agreements were not a major issue, and therefore, they did not receive special treatment. In *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*,[250] the issue before the Fourth Circuit Court of Appeals was whether under 11 U.S.C. § 365(a) a debtor was permitted to reject a technology licensing agreement. The court held that the agreement was executory, and therefore, it was within the purview of section 365(a).[251] The court strictly interpreted section 365(a) and determined that it would not create any exceptions for technology licensing agreements.[252]

Under the plain meaning rule the court was constrained to follow the plain meaning of section 365(a). Congress had not specifically provided an exemption for technology licensing agreements; therefore, a debtor was permitted to reject them. Unfortunately, as reflected in *Lubrizol*, the plain meaning rule can produce harsh results, which can undermine society's confidence in the judicial system to render justice. Under section 365(a), a technology licensee's business could be destroyed because a technology licensor could readily reject the contract upon which the licensee's business was predicated. Further, an unrelenting adherence to the plain meaning rule can thwart the courts' ability to adapt the law to the needs of a dynamic economy. Under these circumstances, a court would appropriately engage in either nautical or dynamic statutory interpretation. Under such circumstances, the court would be using the common law process to meet the needs of society.[253] The court would not be usurping the legislature's authority because

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(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

11 U.S.C. § 109(g) (1988).

250 756 F.2d 1043 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986).

251 *Id.* at 1046.

252 *Id.* at 1048.

253 For example, 11 U.S.C. § 365(a) permits a debtor to reject an executory contract or expired lease. 11 U.S.C. § 365(a). However, 11 U.S.C. § 365(a) is silent regarding the terms and conditions for rejecting an executory contract. MURPHY, *supra* note 128, § 9.03. Courts have the authority to determine under what circumstances a debtor may reject an executory contract. Therefore, courts have prevented solvent debtors from rejecting executory contracts. *See In re* Waldron, 785 F.2d 936, 940 (11th Cir.), *cert. dismissed*, 478 U.S. 1028 (1986); *In re* Chi-Feng Huang, 23 B.R. 798, 803 (Bankr. 9th Cir. 1982); *In re* Meehan, 59 B.R. 380, 385 (E.D.N.Y. 1986). The court is using the discretion conferred in

the legislature never addressed the issue. Therefore, although the plain meaning rule can insure predictability and reliability, at times, there is a high price to pay for employing it.

E. Congress May Be Slow or Fail to Respond to a Problem that a Decision Has Created

The legislature may either be slow in responding to a problem that a judicial decision has created or the legislature may not respond at all.[254] In *Levit v. Ingersoll Rand Financial Corp.*,[255] V.N. Deprizio Construction Co. (hereinafter the Construction Company) borrowed money from different sources.[256] In order to obtain these loans the Construction Company's principals had to execute personal guarantees, which guaranteed the Construction Company's obligations to the lenders.[257] Under the Code, the Construction Company's principals qualified as insiders.[258] Subsequently, the Construction Company filed for bankruptcy, and a trustee was appointed.[259] Pursuant to 11 U.S.C. § 547(b),[260] the trustee commenced an adversary proceeding to recover

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11 U.S.C. § 365(a) to engage in dynamic or nautical statutory interpretation, and thus, make 11 U.S.C. § 365(a) meet the needs of a changing society.

[254]Professor Jonakait has made the following remarks concerning the plain meaning rule in the context of interpreting evidence rules:

> The plain-meaning standard will do more than just transform the evidentiary landscape; it will also freeze the new forms into unchanging shapes. Once we discover the most natural reading of the Federal Rules of Evidence's words and clauses, the law will be fixed until Congress acts. And Congress will not act often. 'One of the facts of legislative life, at least in this country in this century, is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions.'

Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 784 (1990).

[255]874 F.2d 1186 (7th Cir. 1989).

[256]*Id.* at 1187.

[257]*Id.*

[258]Section 101(31)(B) states:

> (31) 'insider' includes-
> (B) if the debtor is a corporation-
> (i) director of the debtor;
> (ii) officer of the debtor;
> (iii) person in control of the debtor;
> (iv) partnership in which the debtor is a general partner;
> (v) general partner of the debtor; or
> (vi) relative of a general partner, director, officer, or person in control of the debtor;

11 U.S.C. § 101(31)(B) (1988).

[259]874 F.2d at 1188.

[260]Section 547(b) states:

preferences from the lenders and other parties. The trustee took the position that the preference period should be extended to one year for the lenders who had obtained personal guarantees from the Construction Company's insiders. The bankruptcy court rejected the trustee's position and dismissed the adversary proceeding. The district court reversed, and the case went to the Seventh Circuit.

The Seventh Circuit held that the preference period could be extended to one year for creditors of a corporation who had obtained a personal guarantee from an insider.[261] The court relied on the plain meaning of the applicable Code Sections, and the structure of the Code.[262] Under the Code, a guarantor is a contingent creditor until the corporate debt is repaid.[263] Every payment the corporation makes benefits the insider because it reduces the insider's liability.[264] Therefore, the payments are avoidable under section 547(b)(4)-(B).[265] Section 550(a)(1)[266] permits a trustee to recover a preferential transfer from the initial transferee or the entity for whose benefit the transfer was made.[267] Therefore, the trustee was permitted to recover a preferential

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Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-
(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made-
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if-
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (1988).

[261] 874 F.2d at 1200-01.

[262] *Id.* at 1188-89.

[263] *Id.* at 1190.

[264] *Id.*

[265] *Id.*

[266] Section 550(a)(1) provides:
(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or if the court so orders the value of such property, from-
(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made;

11 U.S.C. § 550(a)(1) (1988).

payment made beyond the 90 day period before the commencement of the case from a noninsider creditor.

The *Levit* decision generated a significant amount of controversy.[268] Some courts have refused to follow *Levit* because they have thought that it incorrectly interprets the Code and also because it misconstrues bankruptcy policy.[269] As *Levit* reflects, a major problem with mechanically applying the plain meaning rule is that it ignores the policy implications of a particular case. Personal guarantees play a significant role in the financing of closely held corporations, and the effect of *Levit* is to reduce the value of personal guarantees and make it harder for closely held corporations to obtain financing. Even though there was a strong cry to legislatively overrule *Levit*, it took Congress five years to overrule *Levit*.[270]

F. Context Is Necessary for Interpretation of Statutes

Strict statutory construction can be deficient because words do not have meanings by themselves.[271] Rather, it is necessary to understand the context in which the legislature was acting to comprehend the meaning of the text of a statute.[272] An example of the use of legislative history in the context of commercial law is the Official Comments to the U.C.C.[273] The Official Comments perform an indispensable role in the interpretation of the U.C.C. because they provide context and guidance for the reader.[274] The Official

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[267] *Id.*

[268] Robert F. Higgins & David E. Peterson, *Is There A One-Year Preference Period for Non-Insiders?*, 64 AM. BANKR. L. J. 383 (1990); John S. Cullina, Note, *Recharacterizing Insider Preferences as Fraudulent Conveyances: A Different View of Levit v. Ingersoll Rand*, 77 VA. L. REV. 149 (1991); Mark E. Toth, Comment, *The Impossible State of Preference Law Under the Bankruptcy Code: Levit v. Ingersoll Rand Financial Corp. and the Problem of Insider-Guaranteed Debt*, 1990 WIS. L. REV. 1155.

[269] *In re* Rubin Bros. Footwear, Inc., 119 B.R. 416 (S.D.N.Y. 1990); *In re* J.T.L. Supermarket Corp., 145 B.R. 3 (Bankr. N.D.N.Y. 1992); *In re* Arundel Hous. Components, Inc., 126 B.R. 216 (Bankr. D. Md. 1991).

[270] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 202, 108 Stat. 4106 (1994) legislatively overruled *Levit*.

[271] Dennis Patterson, *You Made Me Do It: My Reply to Stanley Fish*, 72 TEX. L. REV. 67, 68 (1993); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984).

[272] Professor Fiss has written, "Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and values embodied in the text." Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982).

[273] Robert H. Skilton, *Some Comments on the Comments of the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 606-09.

[274] Professor Karl Llewellyn made the following remarks concerning the use of the Official Comments to the U.C.C.:

> 'Every provision should show its reason on its face. Every body of provisions should display on their face their organizing principle. The rationale

Comments of the U.C.C. furnish the reader with an understanding of the problems that the particular Code section was intended to address.[275] Although the drafters of the U.C.C. labored to devise a comprehensive commercial code, they understood that the lawyers and judges who would interpret the U.C.C. needed some type of legislative history in order to interpret the words of the various sections.

The failure to refer to legislative history may lead to the courts misinterpreting a statute. The mechanical application of the plain meaning rule may lead to incorrect results. In *Levit*,[276] the Seventh Circuit mechanically applied the plain meaning rule to the text of sections 547(b) and 550(a), and it held that the preference period could be extended to one year for a creditor whose debt was guaranteed by an insider.[277] The major problem of *Levit* was that it had an adverse impact on small business financing because personal guarantees from insiders are of little or no value.[278] Yet, the strict

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> of that is that construction and application are intellectually impossible except with reference to some reason and theory of purpose and organization. Borderline, doubtful, or uncontemplated cases are inevitable. Reasonably uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application of the same language is the same reason in all cases. A patent reason, moreover, tremendously decreases the leeway open to the skillful advocate for persuasive distortion or misapplication of the language; it requires that any contention, to be successfully persuasive, must make some kind of sense in terms of the reason; it provides a real stimulus toward, though not an assurance of, corrective growth rather than straightjacketing of the Code by way of case-law.'

JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 12 (3d ed. 1988).

[275] ROBERT BRAUCHER & ROBERT A. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 32-34 (1977).

[276] 874 F.2d 1186 (7th Cir. 1989).

[277] *Id.* at 1200-01.

[278] One commentator noted:

> The application of the literal-reading approach has an adverse effect on the financial market. Under a legal regime applying the literal-reading approach, the Outside Creditor's act in taking an insider guarantee significantly increases his aggregate risk in lending the funds. The Outside Creditor is subject not only to the risk that the Insider Guarantor will not be able to satisfy any remaining balance owed by the debtor as of the date of bankruptcy, but also to the risk that he will have to disgorge all payments received during the entire year, rather than those received just ninety days prior to bankruptcy, and then that he will be unable to obtain reimbursement from the Insider Guarantor. This additional exposure induces an Outside Creditor either to (i) continue to take insider guarantees, but demand higher interest rates to compensate for the additional risks, or (ii) refuse to accept insider guarantees, which will foreclose debtors that depend on insider guarantees from obtaining financing in the debt market.

constructionists fail to adequately address the policy ramifications of their decision. Furthermore, although the strict constructionists contend that they are effectuating congressional intent by strictly enforcing sections 547(b) and 550(a), there is little evidence that Congress intended or sought the results produced by *Levit*.[279] The court failed to address the issue of whether Congress intended to extend the preference period to one year for creditors whose obligations were guaranteed by insiders.[280] There is nothing in the legislative history which suggests that Congress intended that creditors who had obtained a guarantee from an insider should be held to a one year preference period.[281] Commercial statutes are not applied in a vacuum, but rather, are applied in a constantly changing world. Legislative history serves as a context under which the judges and attorneys can understand the intent of the statute and the meaning of the words used in the text of the statute. *Levit* reflects that the mechanical application of a statute can produce decisions which do not reflect congressional intent because Congress never envisioned that a particular statute would be applied to a particular situation.[282] Therefore, plain meaning does not always produce outcomes which are consistent with congressional intent.

G. Analysis

Strict statutory construction fails to vest the judiciary with sufficient discretion to enable it to adapt the law to meet the needs of an evolving society. There will be instances where Congress did not anticipate that a particular statute would be applied to a particular problem, and in these instances the rigid application of the law will produce poor decisions. In order to combat

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Note, *A Hierarchical Recovery Approach: An Alternative Theory of Recovery Under Section 550 of the Bankruptcy Code*, 1 COLUM. BUS. L. REV. 213, 233 (1990); *see also In re* J.T.L. Supermarket Corp., 145 B.R. 3, 4 (Bankr. N.D.N.Y. 1992).

[279]Higgins & Peterson, *supra* note 268, at 390-91; Toth, *supra* note 268, at 1171-73.

[280]One commentator has made the following remarks concerning the preference period to one for creditors who hold insider guarantees:

> But by limiting its inquiry to the words of section 550(a)(1) read in isolation from the statutory structure, the literal approach does not give effect to Congress's intent. The structure of relevant sections of the Code, when viewed against the background of the legislative history of section 550(a)(1) and the circumstances surrounding its enactment, shows that Congress did not intend the result reached by the literal approach.

Henk J. Brands, Note, *The Interplay Between Sections 547(b) and 550 of the Bankruptcy Code*, 89 COLUM. L. REV. 530, 540 (1989).

[281]Donald W. Baker, *Repayments of Loans Guaranteed by Insiders as Avoidable Preferences in Bankruptcy: DePrizio and Its Aftermath*, 23 UCC L. J. 115, 128-29 (1990); Toth, *supra* note 268, at 1165-66.

[282]Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 903-05 (1982).

this problem, Congress should continually review and revise the bankruptcy laws so that they will not become antiquated.[283] If the Code is going to be a comprehensive code governing insolvency proceedings, then it is incumbent upon Congress to insure that the Code does address the major insolvency issues. If Congress fails to revise the bankruptcy laws, then Congress will be remiss in its duty and it will be inviting the judiciary to rectify the problems with the bankruptcy laws. Through inactivity Congress will be delegating its authority to enact bankruptcy legislation to the judiciary. The legislative process will be frustrated and the separation of powers doctrine thwarted.

V. PLAIN MEANING SHOULD BE EMPLOYED WHEN THERE IS A PRECISE STATUTE GOVERNING THE ISSUE, THE ISSUE IS A STRAIGHTFORWARD BANKRUPTCY LAW ISSUE AND PUBLIC POLICY IS NOT INVOLVED

Plain meaning should be used only when there is a precise statute intended to govern a straightforward bankruptcy issue and which does not entail public policy. The more precise the statute then the more willing the judiciary should be to enforce the express terms of the statute. As an honest agent, it is incumbent upon the judiciary to enforce the terms of a statute. The more clearly a statute has been drafted, the less opportunity the judiciary has to deviate from the language of a statute. If the judiciary implements the text of a clear statute, then there will be predictability and reliability, which is essential in the area of bankruptcy and commercial law. Further, the enforcement of clearly drafted bankruptcy statutes insures that the judiciary will enforce legislative contracts. This will protect the different groups involved in the bankruptcy process because each group has usually been involved in the enactment of legislation that seeks to protect the particular interest group.

A court should review the pertinent legislative history to determine the background surrounding the enactment of the particular legislation.[284] Legislative history provides a context for the words used in the statute. The court, also, should attempt to ascertain which interest groups were responsible for the passage of the legislation, and what were the goals of the interest groups. Reviewing the pertinent legislative history helps to insure that the legislative contract will be enforced, and that the terms of the contract will not be misconstrued. It should be noted, that sometimes legislative history will not

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[283]Under public choice theory, one would expect that interest groups would lobby Congress to amend the bankruptcy laws to legislatively overrule poor or adverse bankruptcy decisions. Indeed, interest groups have played a pivotal role in obtaining the passage of most of the major amendments to the Code.

[284]In 1984 Congress passed several major amendments to the Code; however, it failed to prepare any committee reports concerning the meaning and purpose of the 1984 amendments. Peter B. Brandow, Note, *Rejection of Collective Bargaining Agreements in Bankruptcy: Finding a Balance in 11 U.S.C. § 1113*, 56 FORDHAM L. REV. 1233, 1247-48 (1988); Gary M. Roberts, Note, *Bankruptcy and the Union's Bargain: Equitable Treatment of Collective Bargaining Agreements*, 39 STAN. L. REV. 1015, 1036 (1987). If legislative history is going to have any utility, then Congress must be willing to provide thorough reports concerning the legislation that it enacts.

cast any light on an issue because the issue may be relatively recent and may have never been contemplated by Congress.

A case that reflects the correct employment of the plain meaning rule and strict statutory interpretation is *Rake v. Wade*.[285] In *Rake* the debtors were in arrears on long-term promissory notes, which had been assigned to the respondent. The notes provided for a $5 charge for each missed payment; however, the notes did not provide for interest on the arrearages. The notes were secured by first mortgages on the debtors' residences. The value of each of the residences exceeded the value of each of the notes; thus, the respondent was an oversecured creditor.

The Supreme Court held that pursuant to sections 506(b) and 1325(a)(5) an oversecured mortgagee was entitled to postpetition interest on arrearages and also that a residential mortgagee was entitled to postconfirmation interest on the arrearages.[286] The Court reasoned that section 506(b) permits an oversecured creditor to receive postpetition interest.[287] Section 1322(b)(5) authorizes a debtor to cure a default concerning a residential mortgage.[288] Section 1322(b)(5) is silent concerning whether a Chapter 13 plan may include postpetition interest under section 506(b).[289] The Court employed holistic statutory interpretation, and it construed sections 506(b) and 1322(b)(5) in a manner that would give effect to both sections.[290] The Court, using the plain

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[285]113 S. Ct. 2187 (1993).

[286]*Id.* at 2189.

[287]The Court declared:

> 506(b) 'directs that postpetition interest be paid on *all* oversecured claims,' . . . and, as the parties acknowledge, such interest accrues as part of the allowed claim from the petition date until the confirmation or effective date of the plan. The arrearages owed on the mortgages held by respondent are plainly part of respondent's oversecured claims. Under the unqualified terms of § 506(b), therefore, respondent is entitled to preconfirmation interest on these arrearages. When statutory language is clear, our "'sole function . . . is to enforce it according to its terms.'"

Id. at 2191 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 239, 245 (1989) (citations omitted)).

[288]*Id.* at 2192.

[289]*Id.*

[290]The Court stated:

> We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid 'deny[ing] effect to a part of a statute,' we accord "'significance and effect . . . to every word.'" . . . Construing §§ 506(b) and 1322(b)(5) together, and giving effect to both, we conclude that § 1322(b)(5) authorizes a debtor to cure a default on a home mortgage by making payments on arrearages under a Chapter 13 plan, and where the mortgagee's claim is oversecured, § 506(b) entitles the mortgagee to preconfirmation interest on such arrearages.

Rake, 113 S. Ct. at 2192 (quoting *Ex parte* Public Nat'l Bank, 278 U.S. 101, 104 (1928) (quoting Washington Market Co. v. Huffman, 101 U.S. 112, 115 (1879))).

meaning method, also ruled that an oversecured mortgagee was entitled to postconfirmation interest its arrearages under section 1325(a)(5)(B)(ii).[291] Section 1325(a)(5) applies to each secured claim provided for by a Chapter 13 plan.[292] Under section 1325(a)(5)(B)(ii), a mortgagee is entitled to the present value of its claim, and therefore, postconfirmation interest is necessary to insure that the payments under the plan will equal the present value of the mortgagee's claim.[293] A debtor is entitled to split the claims of a residential mortgagee into two components, the underlying debt and the arrearages.[294] The arrearages are part of a residential mortgagee's claim; therefore, they were provided for under the Chapter 13 plan.[295] Thus, under section 1325(a)(5)(B)(ii) a residential mortgagee is entitled to interest on the arrearages.[296]

Rake reflects that debtor-creditor issues should be resolved first by examining specific Code provisions. If a specific Code provision does not determine the issue, then the issue should be decided by reaching a determination that is harmonious with the Code and does not nullify any specific provision. *Rake's* strength is that the Court enforced the Code according to the text of the statute. The Court's method of resolving the issue produces reliability and predictability because the answer to the questions lie in the text of the Code. The Court's determination did not rest on the policy preferences of the individual justices and did not entail unlimited discretion. Instead, the resolution of the issue rested on the words that Congress used when it enacted the particular piece of legislation. In addition, as *Rake* reflects, the strict enforcement of debtor-creditor statutes insures that the judiciary will enforce legislative contracts.[297] This is important in the context of the Code because the statute is the product of interest group legislation and legislative compromises.

A case in which the Court incorrectly deviated from the plain meaning rule is *Dewsnup v. Timm*.[298] In *Dewsnup* petitioner filed for Chapter 7. Thereafter, the petitioner filed an adversary proceeding contending that the debt she owed to the respondents exceeded the fair market value of the real property that secured the debt. Therefore, the bankruptcy court should reduce the value of the lien to the market value of the real property. The petitioner contended that under 11 U.S.C. § 506(a), the respondents would have only a secured claim to the extent of the judicially determined value of their lien. In addition, pursuant to

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[291] *Id.*

[292] *Id.*

[293] *Id.* at 2192 n.8.

[294] *Id.* at 2192.

[295] *Rake*, 113 S. Ct. at 2193.

[296] *Id.*

[297] Public choice theory can only operate if the legislature is willing to enforce the terms of a statute. If the judiciary is going to engage in policy making or equity, then the legislative contract will be destroyed.

[298] 112 S. Ct. 773 (1992).

section 506(d),[299] the bankruptcy court would be required to void the remaining part of the lien because the remaining portion was not an allowed secured claim within the meaning of section 506(a). The lower courts rejected the petitioner's argument. The Supreme Court granted certiorari. The issue before the Court was whether, pursuant to section 506(d), a debtor may strip down a creditor's lien on real property to the value of the collateral, when the value of the collateral is less than the amount of the claim secured by the lien?

The Court held that a debtor could not use section 506(d) to strip down the value of the collateral, when a creditor had an allowed claim.[300] The Court reasoned that the term "allowed secured claim" in section 506(d) should not be read in reference solely with section 506(a), but instead, should be read in conjunction with section 502.[301] Thus, in order for section 506(d) to become operative, first the claim must be disallowed under section 502.[302] The Court accepted this argument because it thought that the statute was ambiguous and it was also reluctant to deviate from pre-Code law.[303] Under pre-Code law liens passed through bankruptcy unaffected.[304] Further, excluding certain reorganization provisions, no Bankruptcy Act statute permitted the reduction of the value of a lien for any reason except payment of the underlying debt.[305] When Congress enacted the Code it was aware of existing bankruptcy law, and the Court thought it was unlikely that Congress would enact such a major change without making its intent evident in either the legislative history or the statute.[306]

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[299]The relevant part of 11 U.S.C. § 506(d) states: "To the extent that a lien secured a claim against the debtor that is not an allowed secured claim, such lien is void . . ." 11 U.S.C. § 506(d).

[300]112 S. Ct. at 778.

[301]*Id.* at 777.

[302]*Id.*

[303]The Court stated:

> Were we writing on a clean slate, we might be inclined to agree with petitioner that the words "allowed secured claim" must take the same meaning in § 506(d) as in § 506(a). But, given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected.

Id.

[304]*Id.*

[305]112 S. Ct. at 779.

[306]The Court declared:

> Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history. Of course, where the language is unambiguous, silence in the legislative history cannot be controlling. But, given the ambiguity here, to attribute to Congress the intention to grant a debtor

When sections 506(a) and 506(d) are read in conjunction they permit an undersecured creditor's lien to be stripped. This is a natural reading of the two Code Sections, and there is no ambiguity. The problem with *Dewsnup* is that the Court departed from strict statutory interpretation because it did not like the policy consequences that strict statutory construction would have produced. There was no justification for deviating from the plain language of the statute because the case did not involve public policy issues. The Court engaged in judicial legislation, and therefore, it deprived Congress of its authority to establish uniform laws concerning bankruptcy. Finally, the Court's decision weakened the concept of predictability because the Court is willing to rely upon pre-Code law in order to resolve a debtor-creditor issue.

A case in which the Supreme Court correctly departed from strict statutory construction is *Midlantic National Bank v. New Jersey Department of Environmental Protection*.[307] In *Midlantic*, Quanta Resources Corporation (hereinafter Quanta) processed waste oil at two facilities.[308] The New Jersey Department of Environmental Protection (hereinafter NJDEP) discovered that Quanta had illegally dumped 400,000 of contaminated oil, and it ordered Quanta to cease its operations.[309] Quanta and the NJDEP entered into negotiations concerning the clean up of the site.[310] But, before the negotiations were concluded Quanta filed for Chapter 11.[311] After Quanta filed for Chapter 11, an investigation revealed that Quanta had also accepted and stored contaminated oil in its New York site.[312] The mortgages exceeded the value of the real property of the New York site, and the estimated clean up rendered the property burdensome.[313] Pursuant to 11 U.S.C. § 554(a),[314] the trustee sought to abandon both sites.[315]

> a new remedy against allowed claims to the extent that they become 'unsecured' for purposes of § 506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.

Id. (citations omitted).

[307] 474 U.S. 494 (1986).

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *Midlantic Nat'l Bank*, 474 U.S. at 494.

[313] *Id.*

[314] Section 554(a) states:

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

11 U.S.C. § 554(a) (1988).

[315] *Midlantic Nat'l Bank*, 474 U.S. at 494.

The Court held that a trustee could not use section 554(a) to abandon property in contravention of state laws designed to protect the public's health and safety.[316] Before the enactment of the Code, a trustee's authority to abandon property was restricted to protect legitimate federal and state interests.[317] A trustee had to comply with applicable health and safety regulations.[318] When Congress enacted section 554, it also presumably enacted the restrictions that were associated with the power of abandonment.[319] If Congress had intended to change the rule it would have made its intent known.[320] If Congress, moreover, intended to grant a trustee "an extraordinary exemption from nonbankruptcy law", then Congress would have clearly expressed its intention.[321] This is consistent with the structure of the Code that places limitations on a trustee's powers.[322] Section 362(b)(5) and its legislative history reflect that the state is authorized to sue a debtor for the violation of environmental laws.[323] In addition, 28 U.S.C. § 959(b),[324] reflected that Congress did not intend to preempt all state laws.[325] Finally, Congress has demonstrated a concern for the improper disposal of contaminated oil, and therefore, it is unlikely that presume that it would approve of a trustee using the abandonment power to abandon a toxic waste site.[326]

In *Midlantic* the majority reached the correct conclusion because this case did not involve a debtor-creditor issue. Rather, *Midlantic* involved a significant public policy issue: whether, under section 554(a), a trustee could abandon a toxic waste site. The Court deviated from the express text of the statue because the answer to the question was found in the policy rather than in the text of section 554(a). Historically, a trustee was not permitted to abandon property of

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316*Id.* at 502.

317*Id.* at 500.

318*Id.* at 502.

319*Id.* at 501.

320*Midlantic Nat'l Bank*, 474 U.S. at 501.

321*Id.*

322*Id.*

323*Id.* at 503-04.

324Section 959(b) states:

> Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 959(b) (1988).

325*Midlantic Nat'l Bank*, 474 U.S. at 505.

326*Id.* at 505-06.

the estate in contravention of state and federal health and safety laws.[327] Abandonment was not intended to be used as a subterfuge to permit a debtor to violate state and federal law. Indeed, different Code provisions reflect that a debtor may not escape legitimate federal and state regulation by filing for bankruptcy.[328] The Code's legislative history also indicates that when a debtor violates a state's environmental laws, the debtor will still be subject to prosecution.[329] The enforcement of state and regulatory laws is a fundamental tenet underlying bankruptcy; therefore, the Court's analysis and holding in *Midlantic* is correct.

VI. CONCLUSION

Strict statutory interpretation should be limited to those cases in which the court is interpreting a precisely drafted debtor-creditor statute, which does not entail public policy issues such as health or public safety. Through strict statutory interpretation the court is able to enforce the legislative deals and effectuate congressional intent by enforcing the language of the statute. Strict statutory construction will also lead to predictability and reliability, and will help to simplify the law.

Courts should not use strict statutory interpretation when a public policy issue is involved because blind adherence to a statute could produce horrendous results. Under these circumstances, one can argue that Congress did not anticipate that the statute would be used in this manner, and therefore, deviating from the text of the statute does not thwart congressional intent. Further, it can also be argued that the judiciary is only attempting to resolve the issue in a manner that it thought Congress would have chosen if it had anticipated the problem. Therefore, under these circumstances, deviating from the text of a statute does not undermine legislative intent.

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[327] A key aspect of the *Midlantic* opinion is that the Court engages in historic statutory interpretation. The Court examined the historic evolution of abandonment as providing a legislative history or context for interpreting § 554(a). The Court used the judicially developed interpretation of abandonment to prevent a literalistic interpretation of § 554(a).

[328] *See* 11 U.S.C. §§ 362(b)(4), (b)(5) (1988); 28 U.S.C. § 959(b) (1988).

[329] H.R. REP. No. 595, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838.